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In The

Supreme Court of the United States

SUMMIT PROPERTIES, INC. *et al.*,

Petitioners,

v.

HOECHST-CELANESE CORP., formerly known as CELANESE CORP. *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Under a RICO "scheme to defraud," is reliance and inducement or target status necessary – not merely sufficient – to establish "proximate cause" between "violation" and "injury"?

PARTIES TO THE PROCEEDINGS

Petitioners

Summit Properties, Inc.

Summit Properties Limited Partnership

Summit Properties Partnership Limited Partnership

StonyPoint/Summit Limited Partnership

Mcgregor/Mcguire Limited Partnership

Henderson/Mcguire Partners Limited Partnership

Oak Ridge/Mcguire Partners Limited Partnership

Waverly Place/Summit Partners Limited Partnership

Respondents

E.I. DuPont De Nemours & Co.

Bow Industrial Corp.

Shell Oil Co. d/b/a Shell Chemical Co.

Household International, Inc.

Hoescht-Celanese Corp. f/k/a Celanese Corporation

Hoescht Corporation

Vanguard Plastics, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on June 7, 2000.

OPINIONS BELOW

The decisions of the United States District Court for the Southern District of Texas are unreported and reprinted in the Appendix to this Petition. (App. 20a and 28a)

The decision of the United States Court of Appeals for the Fifth Circuit is reported at 214 F.3d 556 and is reprinted in the Appendix to this Petition. (App. 1a-12a)

The Order of the United States Court of Appeals for the Fifth Circuit denying the petition for rehearing and for rehearing en banc is reprinted in the Appendix to this Petition. (App. 82a-83a)

JURISDICTION

The jurisdiction of this Court rests on 28 U.S.C. § 1254. The judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 7, 2000. Petitioners' timely petition for rehearing and petition for rehearing en banc was denied on July 27, 2000. (App. 82a-83a)

STATUTORY PROVISIONS

18 U.S.C. § 1964(c), in relevant part, provides:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost

of the suit, including a reasonable attorney's fee. . . .

18 U.S.C. § 1962(c), in relevant part, provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . .

18 U.S.C. § 1961, in relevant part, provides:

> (1) "racketeering activity" means . . . (B) any act which is indictable under any of the following provisions of title 18, . . . United States Code section 1341 (relating to mail fraud), section 1343 (relating to wire fraud). . . .

18 U.S.C. § 1341, in relevant part, provides:

> Whoever having devised . . . any scheme . . . to defraud . . . for the purpose of executing such scheme . . . places in any post office . . . any matter . . . to be sent or delivered by the Postal Service . . . shall be fined . . . or imprisoned. . . .

18 U.S.C. § 1343, in relevant part, provides:

> Whoever, having devised . . . any scheme to defraud . . . transmits by means of wire communication in interstate or foreign commerce, any- . . . signals . . . for the purpose of executing such scheme . . . shall be fined . . . or imprisoned. . . .

STATEMENT OF THE CASE

This Petition presents a single question: Under a RICO "scheme to defraud," is reliance and inducement or target status – not merely sufficient – but necessary to establish "proximate cause" between "violation" and "injury"?

The Fifth Circuit says "yes." The Sixth and Seventh Circuits agree. The Second, Third, Fourth, Eighth, Eleventh, and District of Columbia Circuits say "no." The resolution of this square conflict is required to settle a recurring legal question in nation-wide litigation under an important Federal statute that guarantees integrity in the Nation's marketplace. This Petition presents this Court with an apt vehicle to settle this conflict.

Petitioners are property owners that suffered damages as a result of defective Polybutylene ("PB") pipes and acetal plastic fittings in hot-and-cold water plumbing systems. (App. 79a) Respondents are manufacturers that marketed PB pipes and acetal fittings for use in plumbing systems through a complex "scheme to defraud." Petitioners seek to recover from Respondents the damages caused to their businesses and properties when the PB pipes and acetal fittings in their systems failed. (App. 79a)[1]

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[1] This statement of facts is based on the Second Amended Complaint and the RICO Case Statement. Petitioners' allegations must be accepted as true on a motion to dismiss. *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993). The RICO Case Statement is part of the Petitioners' Complaint. *Marriott Bros. v. Gage*, 911 F.2d 1105, 1108 (5th Cir. 1990). Dismissal of a complaint is only proper if it is "clear that no relief could be granted under any set of facts that could be proven consistent with the allegations." *H.J. Inc. v. Northwestern Bell Telephone Co., Inc.*, 492 U.S. 229, 249-50 (1988) (RICO). General allegations "are presum[ed] to embrace those specific facts necessary to support the claims." *N.O.W. v. Scheidler*, 510 U.S. 249, 256 (1994) (RICO). The Complaint and RICO Case Statement amplify in rich detail Petitioners' basic allegations; they constitute, therefore, an excellent factual record – *legally* not in dispute – on which the circuit court conflict identified by this Petition may be appropriately resolved by this Court.

PB is a by-product of the oil refining process. (App. 52a) Respondent Shell Oil Company ("Shell") purchased an exclusive 10-year right to sell PB in the United States in the 1970's. (App. 52a) Shell then sold PB resin pellets to the Respondents Bow, Vanguard, and Household's subsidiary that extruded the pellets into plastic pipe. (App. 52a) Respondents Celanese and DuPont sold acetal resins that were used by the manufacturers to mold fittings for the systems. (App. 53a)

Shell orchestrated a complex "scheme to defraud" between itself and the other Respondents designed to convince the construction industry and – significantly, its standard-setting bodies – that the use of PB pipes and acetal fittings in plumbing systems would be suitable for those systems and that they were superior to, and less expensive than, copper pipes, the use of which then dominated the market. (App. 55a) The scheme was a fraud on the market. (App. 52a) Respondents marketed PB pipes and acetal fittings across the country to code bodies, builders, developers, plumbing distributors, and other users of plumbing parts. (App. 52a, 57a-58a) Their objective was to create an enormous demand for PB pipe and acetal fittings by making them "the material of choice" instead of copper for residential and commercial plumbing systems. (App. 57a).[2] Among other things, the Respondents represented that PB pipes and acetal fittings: (1) were suitable for use in a potable water plumbing system; (2) would last at least 50 years; (3) would not corrode and even the most aggressive water would not attack it; (4) was easy, reliable, simple, proven and fast to

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[2] That objective is revealed in Shell's Marketing Plan, which is reprinted in full in App. 85a-101a.

install; and (5) would not occasion serious service problems. (App. 59a-60a) These representations were knowingly false. (App. 60a). In fact, scientists within the companies of the Respondents specifically advised their superiors that the PB and acetal resins were not suitable for water systems because they would degrade when exposed to chlorinated water. (App. 61a) Hope for increased profits by the marketing arms of the Respondents prevailed over these scientific objections. *(Id.)*

The District Court granted Respondents' Motions to Dismiss Petitioners' claim for relief for a RICO "scheme to defraud" under Fed. R. Civ. Pro. 12(b)(6) for two reasons: (1) false representations and omissions were not made to Petitioners, and (2) they were not relied upon by Petitioners. (App. 24a-25a) Petitioners filed a Motion to Alter or Amend Judgment and for Reconsideration under Fed. R. Civ. P. 59(e). The District Court denied the Motions, finding, without an analysis of the relevant factors, that Petitioners' injuries were also "indirect" under *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992). (App. 15a)

The Fifth Circuit affirmed. It phrased the question as "whether a plaintiff's reliance on the predicate mail or wire fraud is *necessary* in order to establish causation." (214 F.3d at 558; App. 4a) (emphasis added) Commenting that "[m]ost other circuits . . . require a showing of detrimental reliance by the plaintiff," and that reliance on "representations by various entities who stated the plaintiffs' properties conformed to local building codes" was "not reliance upon representations *by defendants*," the Circuit affirmed the decisions of the District Court. (*Id.* at 559 n.15; 560; App. 7a, 12a) (emphasis added). For the Circuit, the "fraud . . . [must] *induce* the purchase transactions." (*Id.*; App. 7a) (emphasis added) "[A] plaintiff" [must be] . . . the *target* of . . . [the] fraud or . . . *rel[y]*

upon the fraudulent conduct *of the defendants.*" (*Id.* at 561; App. at 10a) (emphasis added). "Defendants' competitors might recover for competitive . . . [injury] but . . . [as] these *particular* plaintiffs were [not] the *targets* of a scheme to defraud accomplished *by defrauding others,*" they could not recover for their injuries. (*Id.* and n.22; App. 10a) (emphasis added)

Rehearing and rehearing en banc were denied on July 27, 2000. (App. 82a).

REASONS FOR GRANTING THE WRIT

I. CONFLICTING WITH SIX COURTS OF APPEAL THAT PROPERLY FOLLOW *HOLMES V. SECURITIES INVESTOR PROTECTION CORP.*, 503 U.S. 258 (1992), THE FIFTH CIRCUIT'S HOLDING – THAT TO ESTABLISH PROXIMATE CAUSE FOR A RICO SCHEME TO DEFRAUD, THE PLAINTIFF MUST NECESSARILY SHOW RELIANCE AND INDUCEMENT OR TARGET STATUS – REQUIRES REVIEW TO SETTLE A RECURRING LEGAL QUESTION IN NATION-WIDE LITIGATION UNDER AN IMPORTANT FEDERAL STATUTE THAT GUARANTEES INTEGRITY IN THE NATION'S MARKETPLACE.

A. Overview of Argument.

The Fifth Circuit's decision is sharply at odds with the majority view. Its test for "proximate cause" in a RICO "scheme to defraud" – "reliance and inducement or target status" – is echoed by the Seventh Circuit precedent, is consistent with Sixth Circuit precedent, but it is in square conflict with decisions of the Second, Third, Fourth, Eighth, Eleventh, and District of Columbia Circuits. It also fundamentally misperceives *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), which is properly followed by the majority view. *Holmes* establishes for RICO a three factor test to distinguish "direct"

and "indirect" injuries. It does not require "reliance and inducement" for the nexus between "violation" and "injury" or "target," a label, for "direct or indirect," that is, "remoteness." Contrary to the majority view, the Fifth Circuit conflates "scheme to defraud" under Federal law with common law crimes and torts that did – and did not – contain misrepresentation and reliance elements. Similarly, in reading "by reason of" – which under *Holmes* incorporates "proximate cause" concepts – to require, *necessarily*, inducement and reliance by the victim or that the victim be a specific "target" of the "scheme to defraud," the Fifth Circuit continues a fracture in the circuits by fusing two independent aspects of "proximate cause": nexus between "violation" and "injury," and the relationship of "near" and "remote" between a range of RICO victims. Reliance and inducement may be *sufficient* to establish proximate cause; they are not *necessary* to establish it. "Target" is a label that this Court shuns, as the other circuits rightly realize.

RICO establishes a dual criminal and civil system of enforcement of the Federal fraud predicates based on "scheme to defraud." Criminally, they are enforced without requiring a showing of success, but if the scheme is successful, forfeiture of property may be imposed. Civilly, they are enforced through Governmental and private suits. If the scheme is successful, the Government may seek the disgorgement of illicit profits; the victim of the scheme may seek treble damages and counsel fees for injury to business or property "by reason of" the scheme. The Fifth Circuit's opinion threatens to undermine this dual enforcement mechanism, which requires uniformity in criminal and civil litigation. Uniformity is also required to avoid forum shopping and unjustifiably divergent legal outcomes that are not fair to litigants and undermine the effectiveness of the statute. Review of the

Fifth Circuit's decision is required to resolve a recurring legal question in nation-wide litigation under an important Federal statute that guarantees integrity in the Nation's marketplace. This Petition presents this Court with an apt vehicle to settle this conflict between the circuits. Certiorari should be granted, therefore, to resolve an intolerable conflict that should not be allowed to fester further.

B. The Fifth Circuit's Decision Squarely Conflicts With Decisions Of The Second, Third, Fourth, Eighth, Eleventh, And District of Columbia Circuits That Properly Follow *Holmes*.

While the Fifth Circuit cites other circuit courts of appeal decisions to support its "reliance and inducement or target" rule under RICO,[3] those decisions, in fact, do not. (214 F.3d at 560 n.16; App. 7a) (collecting, in chronological order, decisions from the 3rd, 4th, 8th, 6th, 11th, 2nd and 7th circuits).

(1) Third Circuit Conflicts.

In *Environmental Tectonics v. W. S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1055 (3d Cir. 1988), *aff'd on other grounds*, 493 U.S. 400 (1990), the Third Circuit properly required, in a RICO "scheme to defraud," neither misrepresentation to, reliance by, inducement of, nor target status by the victim. The defendants bribed Nigerian government officials to win a defense contract. The mailings implementing the

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[3] Public L. No. 91-452, tit. ix, 84 Stat. 922, 941 (1970) (codified at 18 U.S.C. § 1961 *et seq.*) The civil provisions of RICO are found in 18 U.S.C. §§ 1964, 1965. *See* G. Robert Blakey, *et al.*, *Reflections on Reves v. Ernst & Young*, 33 AM. CRIM. L. REV. 1345, 1346 n.3 (1995) (collecting the best of a range of analyses of RICO) (hereinafter "Reflections").

fraud were sent to the Nigerian government, not the plaintiffs; it was the "target" of the fraud, not the plaintiffs. Nonetheless, the Third Circuit squarely held that "the plaintiff's complaint of injury from the bribery scheme . . . meet[s] [the proximate cause] standard" of RICO. 847 F.2d at 1067. Indeed, the Third Circuit appropriately applied the *same* standard of "proximate cause" to antitrust *and* RICO.[4]

The Fifth Circuit cites *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 746-47 (3rd Cir. 1996), as supporting its "reliance and inducement or target" rule, but *Ideal* is a simple, two-party representation case, where lack of reliance can establish lack of "proximate cause"; in fact, the plaintiff in *Ideal* "knew it was being overcharged for purchases almost from the start." *Id.* at 746. No nexus – proximate or otherwise – existed between the "alleged" representations and the "alleged" injury. *Ideal* is not, as here, or in *Environmental Tectonics*, a complex, multiparty "scheme to defraud" that extends substantially beyond simple misrepresentations in a face-to-face transaction. Here, as in *Environmental Tectonics*, but not in *Ideal*, "proximate cause" can be established in an alternative fashion fully consistent with general standards of "proximate cause." *Ideal Dairy* is, therefore, inapposite.

(2) Eighth Circuit Conflicts.

Nor does the Eighth Circuit support the Fifth Circuit's blanket rule. In *Atlas Pile Driving Co. v. DiCon Fin.*

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[4] *See infra* nn.7 and 17 for discussions of "proximate cause" under antitrust. No antitrust decision, of course, holds that "proximate cause" under the antitrust statutes requires reliance and inducement; this Court eschews, too, the use of the "target" label in antitrust.

Co., 886 F.2d 986 (8th Cir. 1989), the plaintiffs were subcontractors at a home building site who were not paid for their work. The general contractor was a strawman who borrowed funds from the seller and a finance company, paid himself richly for small amounts of work, and then defaulted on the loans. At trial, where the property seller and lender were defendants, the common law fraud claims were *dismissed* for a lack of necessary elements (misrepresentation, etc.). 886 F.2d at 991. Plaintiffs succeeded, however, in proving their RICO claims, which were premised on a "scheme to defraud" arising out of the foreclosure notices mailed by the lender. The foreclosure notices were not inaccurate, and they did not induce reliance on the part of the subcontractors who received them. The Eighth Circuit follows a "reliance requirement" in simple, two-party representation cases. *See, e.g., Flowers v. Continental Grain Co.*, 775 F.2d 1051, 1054 (8th Cir. 1985). Nevertheless, the Eighth Circuit in *Atlas* properly affirmed a judgment under civil RICO where defendants engaged in a complex, multiparty "scheme to defraud" that entailed neither mailed misrepresentations, reliance, nor inducement.

The Fifth Circuit cites *Appletree Square v. W. R. Grace & Co.*, 29 F.3d 1283, 1285-86 (8th Cir. 1994), as supporting its blanket rule, which, in fact, it does. *Appletree Square*, however, is an anomaly in the Eighth Circuit. In fact, *Bieter Co. v. Blomquist*, 987 F.2d 1319, 1325 n.4 (8th Cir. 1993) and *UnitedHealth Care Corp. v. Am. Trade Ins. Co. Ltd., et al.*, 88 F.3d 563 (8th Cir. 1996) are far more typical examples of Eighth Circuit law on "proximate cause" under RICO. In *Bieter*, a commercial developer lost a zoning battle through bribery that was part of a complex "scheme to defraud," as in *Environmental Tectonics*. The District Court dismissed the complaint because of lack of "proximate cause" and injury to "property." Properly

applying the three *Holmes* factors to distinguish between "near" and "remote" RICO claimants – which *Appletree Square* did not – the Eighth Circuit reversed and found that "proximate cause" was a matter of fact for the jury. 987 F.2d at 1326-28. It held, too, that the District Court's view of "property" – taken from regulatory law, that is, losing a zoning variance is not a "taking" of "property" – was flawed. 987 F.2d at 1327 (citing *Environmental Tectonics*). In sum, it held that the District Court adopted an "excessively narrow view of causation and injury," 987 F.2d at 1320, that "would not be consistent with purposes of RICO," to wit, "to root out public corruption." *Id.* at 1329. Similarly, in *UnitedHealth Care Corp.*, insurance premiums were misappropriated through a complex, multi-party "scheme to defraud" a series of insureds; neither misrepresentation, reliance, inducement, nor target status was required to establish "proximate cause." 88 F.3d at 571 n.5 and 572. The Fifth Circuit's blanket rule is at odds with *Atlas, Bieter,* and *UnitedHealth Care Corp.*[5]

(3) Eleventh Circuit Conflicts.

In *Taffet v. Southern Co.*, 930 F.2d 847 (11th Cir. 1991), *rev'd on other grounds*, 958 F.2d 1514 (11th Cir. 1992), the Eleventh Circuit did not follow a blanket "reliance and inducement or target" rule. There, utilities hatched a complex "scheme to defraud" that required a dual accounting system designed to mislead both the Internal Revenue Service and the Public Service Commission by

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[5] *Newton v. Tyson Foods, Inc.*, 207 F.3d 444, 446-47 (8th Cir. 2000) is hard to classify. There, cattle producers alleged injuries suffered when Tyson made illegal payments to exempt the poultry industry from Department of Agriculture regulations. The producers were properly held to be too remote under the *Holmes* factors, but "target" and "zone of interests" labels were also strangely employed.

understating the utilities' income. The plaintiff rate-payers were then forced to pay higher rates because of the "scheme to defraud." The "fraud [was] upon the state agency." *Id.* at 857. The plaintiff rate-payers did not receive the misrepresentations, did not rely on them, took no action induced by the fraud, and were not its target. In fact, in simple, two-party misrepresentation cases the Eleventh Circuit, like the Eighth Circuit, follows a "reliance" requirement. *See, e.g., Pelletier v. Zweifel*, 921 F.2d 1465, 1499 (11th Cir. 1991), properly cited by the Fifth Circuit. (214 F.3d at 560 n.16; App. 7a). Nevertheless, in *Taffet*, the Eleventh Circuit squarely held that the plaintiff rate-payers stated a "tangible, cognizable RICO injury." 930 F.2d at 857. *Accord All Care Nursing Service v. High Tech Staffing*, 135 F.3d 740, 745 n.10 (11th Cir. 1998) (complex RICO "scheme to defraud"; injury shown – expressly – without "reliance"); *Cox v. Administrator for United States Steel & Carnegie*, 17 F.3d 1386, 1399 (11th Cir. 1994) (complex RICO bribery scheme; "proximate cause" shown without reliance, inducement, or target status; question resolved by general "proximate cause" standards), *modified on other grounds*, 30 F.3d 1347, *cert. denied*, 510 U.S. 1110 (1995). Any fair description of the "rule" followed in the Eleventh Circuit must, therefore, include *Taffet*, *Cox*, and *All Care Nursing Service*, which the Fifth Circuit's opinion ignores and which are in square conflict with the adoption of a blanket rule.[6]

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[6] The Fifth Circuit's decision is in accord with *Johnson Enterprises of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1318 (11th Cir. 1998) (cited at 214 F.2d at 560 n.20; App. 9a); *Johnson*, however, merely cites the "target" language of *Pellitier*; it does not distinguish *All Care*, *Cox* or *Taffet*; *Johnson* is an aberration, a misapplication of *Pellitier*; it cannot represent the law of the Circuit since a panel may not overrule a prior panel without going en banc. *Scott v. Prudential Securities, Inc.*, 141 F.3d 1007, 1015 n.16 (11th Cir. 1998).

(4) Second Circuit Conflicts.

In *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1311-12 (2nd Cir. 1999), properly cited by the Fifth Circuit (214 F.3d at 560 n.16; App. 7a), the Second Circuit, moreover, reached a result fully consistent with *Taffet*, even though in *Suffolk* the commission did *not* rely on the misrepresentations, as in *Taffet* it did. In *Suffolk*, the Second Circuit held that the *absence* in the record of proof that the rate-setting commission relied on the misrepresentations by the utilities precluded the rate-payers from establishing that the misrepresentations were the "proximate cause" of their higher rates; it did *not* require, however, that the misrepresentations be made to the rate-payers or that the rate-payers be a "target" of the fraud. Had the rate-setting commission, in fact, relied on the misrepresentations, the outcome would have been different. *Accord Ifill v. West*, 1999 U.S. Dist. Lexis 21320 *32-*35 (S.D.N.Y. Sept. 1, 1999) (RICO "scheme to defraud"; personal reliance not required; element may be met by third party reliance; decisions collected). In simple, two-party misrepresentation cases, involving a face-to-face transaction, the Second Circuit applies a "reliance" element *to establish* proximate cause. *See, e.g., Metromedia Co. v. Fugazy*, 983 F.2d 350, 368 (2nd Cir. 1992) (RICO). Yet the Second Circuit also unequivocally recognizes that RICO is different from common law fraud. *See, e.g., Cement Contractors Workers District Council Welfare Fund v. Lollo*, 148 F.3d 194, 196 (2nd Cir. 1998) (distinguishing New York fraud law that requires that the misrepresentations be to the person who relies on them from RICO, where "proximate cause" may be established by third party reliance, and citing favorably *Shaw v. Rolex Watch, U.S.A.*, 726 F. Supp. 969, 973 (S.D. N.Y. 1989) (false statement made to Customs official; parties injured by unauthorized importation of watches state claim for RICO "scheme to

defraud")). *See also Standbred Owners Ass'n v. Roosevelt Raceway Associates*, 985 F.2d 102, 163-65 (2nd Cir. 1993) (RICO "scheme to defraud"; under *Holmes*, misrepresentations to bond authority actionable by third parties that made expenditures in reliance on them). Plainly, these Second Circuit decisions are in conflict with the Fifth Circuit's blanket rule.[7]

(5) Fourth Circuit Conflicts.

In *John C. Holland Enter., Inc. v. J.P. Mascaro & Sons, Inc.*, 653 F. Supp. 1242 (E.D. Va. 1987), *aff'd without opinion*, 829 F.2d 1120 (4th Cir. 1987), the Fourth Circuit upheld a RICO claim closely analogous to *Environmental Tectonics* and *Bieter*, but squarely in conflict with the Fifth Circuit's blanket rule. There, the defendant successfully bid on a contract falsely claiming to be a small business. The plaintiff, a disappointed bidder, sued for common law fraud and RICO "consisting of multiple acts of mail and wire fraud." 653 F. Supp. at 1249. The District Court

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[7] *Taffet*, not mentioned by the Fifth Circuit, and *Suffolk*, cited for the wrong position, are particularly significant. This Court in *Holmes* cited *these* cases as illustrative of circumstances where, in fact, "proximate cause" "might" be established. *Holmes*, 503 U.S. at 272 n.19. Vainly, the Fifth Circuit sought to distinguish this reference in *Holmes* by noting a difference, *not given significance in Holmes*, that is, "direct and contemporaneous" rather than "later" and "untainted." (214 F.3d at 561 n.11; App. 10a-11a). In fact, "intent" alone is *not* sufficient to establish "proximate cause" under antitrust law on which the *Holmes* standard was modeled. *Holmes*, 503 U.S. at 267. "Negligence," when other factors are present, *is* sufficient to establish "proximate cause" under antitrust law. *See Associated General Contractors of CA v. CA Council of Carpenters*, 459 U.S. 519, 535 (1983) (antitrust) (intent "not a panacea") ("AGC"); *Blue Shield of VA v. McCready*, 457 U.S. 465, 478-79 (1982) (antitrust) (negligence with other factors sufficient).

dismissed the common law fraud claim because the Government, not the plaintiff, relied on the defendant's false certification; it refused to dismiss the RICO claim because the "proximate cause" requirements of a "scheme to defraud" were different than the "proximate cause" requirements of common law fraud. *Id.* Like *Environmental Tectoni* the Third Circuit and *Bieter* in the Eighth Circuit, *Holland* in the Fourth Circuit cannot be squared with the Fifth Circuit's blanket rule.

The Fifth Circuit also cites *Chisolm v. TransSouth Fin. Corp.*, 95 F.3d 331, 337 (4th Cir. 1996), as among the decisions supporting its "reliance, inducement or target" rule. (214 F.3d at 560 n.16; App. at 7a) In fact, *Chisolm* is squarely in conflict with the Fifth Circuit's decision – on closely analogous facts. In *Chisolm*, plaintiffs were the victims of a used car churning "scheme to defraud," in which people of low income were sold financed cars at inflated prices that they could not afford; when they inevitably defaulted, the cars were repossessed by agents of the finance company, and they were sold at a fraudulent auction back to the used car dealer for resale to new victims. The victims were sent a "Notice of Private Sale," which was, as here, "technically accurate." Following *Holmes*, the Fourth Circuit held that a "proximate cause" relation had to be established between "the violation" and "the injury," which, in turn, usually required "detrimental reliance." 95 F.3d at 336. The District Court had dismissed the civil RICO claim without leave to amend because it thought that plaintiffs did not rely on TransSouth's Notice of Private Sale because, even if they had been told the full truth (it was a sham), they were not in a position to redeem the cars. The magistrate judge, whose report recommending dismissal the District Court adopted, observed:

> Plaintiffs' "reliance" argument amounts to no more than a general complaint that Trans South

> participated in a massive fraud, an illegal and profitable scam, that took advantage of the innocent plaintiffs' reliance *on the apparent legitimacy and legality of the operation.*

95 F.3d at 338 (emphasis added). The Fourth Circuit, however, squarely held that "reliance on the apparent legitimacy and legality of the operation" *was* sufficient. *Id.* ("We could scarcely say it more clearly.") The Fifth Circuit's decision that reliance on the notices given to the Petitioners that their properties conformed to the local building codes was *insufficient* follows the *rejected* report of the magistrate, *not* the decision of the Court of Appeals.[8] The Fifth Circuit's decision is in flat contradiction with *Chisolm*.[9]

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[8] That the mailings here were sent by innocent third parties, not a participant in the scheme to defraud, is insignificant. Mail fraud may be violated by "causing" the matter to be mailed. 18 U.S.C. § 1341 ("places . . . or causes to be deposited"); *Pereira v. United States*, 347 U.S. 1, 8 (1954). The Fifth Circuit ignores this well-established principle when it holds that the representations made by third parties to Petitioners that their properties were in compliance with code standards could not be attributed to Respondents' conduct. (24 F.3d at 559 n.15; App. 7a) It could, if the Respondents "caused" them to be made, as they did.

[9] Other decisions in conflict with the Fifth Circuit's blanket rule abound. *See, e.g., Mid Atlantic Telecon, Inc. v. Long Distance Servs., Inc.*, 18 F.3d 260, 263-64 (4th Cir. 1994) (RICO) (long distance competitor may sue, consistent with *Holmes*, under RICO for injury (lost customers and lost revenue) worked by fraud on purchasers induced to buy service at "low prices" that were, in fact, fraudulent); *In re EDC, Inc.*, 530 F.2d 1279 (7th Cir. 1991) (purchaser of insolvent company may sue where purchase was facilitated by scam on Pension Benefit Guaranty Corporation).

Mid Atlantic Telecon and *In re EDC* are vainly distinguished by the Fifth Circuit, (214 F.3d at 560 n.21 and 22; App. 10a), as

(6) Target Status: Conflict With the District of Columbia Circuit.

The Fifth Circuit's holding that reliance and inducement were necessary – not merely sufficient – to establish "proximate cause" was qualified; it framed its blanket rule as "reliance and inducement" *or* "target." (214 F.3d at 560; App. 10a) The so-called "target wing" of the Fifth Circuit's blanket rule, however, reverts to the discredited "label approach" to resolve remoteness under "proximate cause." It is in square conflict with the decisions of the Second, Third, Fourth, Eighth, and Eleventh Circuits, fully discussed, *supra*. It is also squarely rejected by the District of Columbia Circuit Court of Appeals in *BCCI Holdings (Luxembourg), S.A. v. Khalil*, 214 F.3d 168, 174 (D.C.Cir. 2000) (RICO scheme to defraud) ("[*Holmes*] never suggests . . . that the *only* or best way to prove proximate cause is for a plaintiff to prove he was the 'intended target' . . . of the RICO activity. We . . . reject . . . [this] highly restrictive reading of RICO.") (emphasis added).

It remains now only to explicate briefly the correct approach, which is followed by the other circuits, based

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involving the "target wing" of "proximate cause," to be discussed, *infra*, as involving a "high and foreseeable risk" that is the equivalent of "deliberate" conduct, which the Fifth Circuit frankly acknowledges as an exception to its blanket rule.

In fact, even the common law did not follow a blanket rule of reliance and inducement or target for common law fraud. *See, e.g., Bohannon v. Wachovia Bank & Trust Co.*, 210 N.C. 679, 188 S.E. 390 (1936) (testator deceived into disinheriting plaintiff; plaintiff has a claim for relief); *accord* RESTATEMENT OF TORTS (Second) § 774B (1979); *Mitchell v. Langley*, 143 Ga. 827, 85 S.E. 1050 (1915) (holder of life insurance policy fraudulently induced to change beneficiary; beneficiary has a claim for relief).

on the teachings of this Court in *Holmes*. "Upon this point a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.). That history was reviewed in detail by this Court in *AGC*, 459 U.S. at 528-535. As a part of that review, this Court discussed and criticized the *labels* that lower courts used to administer "proximate cause" under the antitrust statutes: "directness," "zone of interests," and "target." *Id.* at 535 n.33. Because it specifically recognized that these labels lead to contradictory and inconsistent results under antitrust, which are also exemplified by this Petition under RICO, this Court *directed* lower courts, instead, to "analyze each situation in light of the [five antitrust] factors" that it identified in its opinion. *Id.* In *Holmes*, this Court reformulated the five *AGC* factors of the antitrust standard for "remoteness" into a three factor standard to fit RICO:[10] (1) the relative "difficult[y]" of "ascertain[ing]" the plaintiff's damage "attributable to the violation" between him and other more immediate victims, (2) the danger that recognizing the less immediate victim's claim would require the "adopt[ion of] complicated rules apportioning damages among plaintiffs removed at different levels of injury . . . to obviate the risk of multiple recoveries," and (3) the absence of a "need to grapple with the problems" because more immediate "victims . . . [could] be counted on to vindicate the law as private attorneys general. . . . " *Holmes*, 503 U.S. at 269-70 (citing *AGC*, 459 U.S. at 540-42). As in *AGC*, *Holmes* did not announce a "black letter" rule that would "dictate the result in every case," but reformulating the 19th century common law "direct or indirect" or "remoteness" rule – which was an analytical or formal "rule" – into a 20th

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[10] RICO does not have an "antitrust injury" analogue. *Holmes*, 503 U.S. at 259 n.15.

century "standard."[11] "Labels," which merely tagged outcomes without giving criteria for decision, were no longer to be used – ostensibly – to determine "remoteness."[12] Far from following *Holmes'* approach to the "remoteness" dimension of "proximate cause," the Fifth Circuit, therefore, reverted to the discredited *label* approach that is not followed by the other circuit courts and is squarely condemned in *AGC* for antitrust and *Holmes* for RICO.

When the proper *Holmes* approach is used, as it is by other circuits, only one conclusion is justifiable here: the "best," if not only, enforcers of RICO against this complex, multiparty "scheme to defraud" are the end-users like Petitioners. The purpose of the use of the *Holmes* factors is *to select* the best enforcer to bring a RICO suit among a range of its victims. *Holmes*, 503 U.S. at 269; *AGC*, 459 U.S. at 4542; *Kansas v. Utilicorp*, 497 U.S. 199, 214 (1990); *California v. ARC American Corp.*, 490 U.S. 93, 102 n.6 (1989) ("ARC"). No plaintiff's claim should be denied under a "remoteness" analysis when the denial is "likely to leave a significant violation [of Federal law] undetected or unremedied." *AGC*, 459 U.S. at 542. Certainly, the code bodies that approved the use of PB plumbing will not seek to sue under RICO, nor could they, because they themselves were not injured. *Cf. Town of West Hartford v. Operation Rescue*, 915 F.2d 92, 103-04

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[11] The distinction between a "rule" (drive 55 mph) and a "standard" (drive reasonably) is brought out in CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICTS 106-08, 110-15, 130-35 (1993).

[12] *See Techt v. Hughes*, 229 N.Y. 222, 244, 128 N.E. 185, 189 (1920) (Cardozo, J.) ("To determine whether . . . [a treaty] has . . . [a] character it is not enough to consider its . . . label. No general formula suffices. We must consult in each case the . . . purpose of the specific articles [of the treaty] involved."), *cert. denied*, 254 U.S. 643 (1920).

(2nd Cir. 1990) (injury to governmental function not "property") (citing *Hawaii v. Standard Oil of CA*, 405 U.S. 251, 262 (1972)). Likewise, the builders and plumbers cannot be counted on to vindicate RICO. Should they sue, however, the character of the damage to them would be distinct, though related, to the damages suffered by Petitioners. To be sure, each received worthless plumbing parts, one to install, one for whom they would be installed. To that degree, part of the damage to each would be similar: the out-of-pocket costs of paying for a defective part. The financial consequences to Petitioners, however, extend far beyond the price of worthless plumbing parts; a plumbing *system* was installed; it must be taken out; if it fails, as it has, *distinct* damages were done to Petitioners that a suit by a builder *will not* and *cannot remedy*. Indeed, these damages are *precisely* like damages that this Court in *Holmes* itself recognized to be outside of its principal remoteness holding. *Holmes*, 503 U.S. at 272 n.19. Under the three *Holmes* factors, therefore, the damages to Petitioners relative to the other victims of the "scheme to defraud" are concrete, not speculative, and they are easily ascertained. Duplication with other victims is minor and easily allocated.[13] Finally, as a practical matter, since the plumbing systems only fail after – sometime substantially after – being installed, Petitioners are in the best, if not only, position to sue under RICO, not only for the "value" of the systems, but also for the substantial consequential damages an installed plumbing system ultimately inflicted on them, when it was made with Respondents' defective pipes and acetal fittings.

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[13] The single satisfaction rule will protect the Respondents to the degree that the identical "value" of a defective part might be recovered by others. *Morley v. Cohen*, 888 F.2d 1006, 1012-13 (4th Cir. 1989).

That makes property owners like Petitioners the "best enforcers" of RICO here. Only they are in a position to recover "full" damages. *Holmes*, 503 U.S. at 273. No danger of a "massive and complex damage litigation" is present. *Holmes*, 503 U.S. at 274 (quoting *AGC*, 459 U.S. at 545). They are, therefore, the "proper plaintiffs" to sue under RICO. *Id.* at 274.

(7) "Scheme to Defraud."

The root of the Fifth Circuit's "reliance and inducement or target" rule lies in its confusing various kinds of "fraud," a term, as Prosser so ably teaches, that is "so vague that it requires definition in nearly every case." WILLIAM PROSSER *et al.*, LAW OF TORTS 727 (5th ed. 1984). The Fifth Circuit conflates "scheme to defraud" under Federal law[14] with "common law obtaining money by false pretenses," a crime, and "common law deceit," a tort – each containing a misrepresentation and reliance element – with "common law cheat," a crime that required a false symbol or token – but neither misrepresentation, inducement, reliance, nor a "target" status – and "conspiracy to defraud," a crime. In fact, "scheme to defraud" principally stems from a careful blend of "common law cheat" and "conspiracy to defraud."[15] "The common-law

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[14] The phrase appears in up to 500 Federal statutes as well as 50 sections of Title 18. *Mail Fraud: Hearings on H.R. 3089 and H.R. 3050 Before the Subcomm. on Crim. Justice of the House Judiciary Comm.*, 100th Cong. 2nd Sess. 17 (1988) (Testimony of Acting Assistant Attorney General John C. Keeney). The development of "scheme to defraud" and its integration into civil RICO is traced in *Reflections* at 1583-1611 (App. B (Defraud)).

[15] *See generally*, Courtney Chetty Genco, *Whatever Happened to Durland: Mail Fraud, RICO, and Justifiable Reliance*, 68 NOTRE DAME L. REV. 333, 337-64 (1992) (historical materials reviewed).

requirements of "justifiable reliance" and "damages" . . . plainly have no place in [establishing a violation of] the federal fraud statutes." *Neder v. United States* 527 U.S. 1, 24-25 (1999). Cheating – without misrepresentation – suffices to establish a "scheme to defraud." *Atlas Pile Driving Co.*, 886 F.2d at 991; *Reflections* at 1588 n.38 (collecting illustrative decisions). Courts read the "mail and wire fraud statutes [to] encompass two types of frauds; those in which misrepresentations are made, and those in which no misrepresentations are made." *Murr Plumbing Co., Inc. v. Scherer Bros. Financial Services Co.*, 48 F.3d 1066, 1069 n.6 (8th Cir. 1995) (RICO "scheme to defraud"); *Reflections* at 1588 n.39 (collecting decisions). "Scheme to defraud" includes the misappropriation of confidential information, that is, embezzlement, which does *not* necessarily include misrepresentation, inducement, or reliance. *Carpenter v. United States*, 484 U.S. 19, 27 (1987).[16] "A comprehensive definition of 'scheme to . . . defraud' need not be undertaken. The phrase is a broad one and extends to a great variety of transactions." *Fasulo v. United States*, 272 U.S. 620, 628 (1926). But its focus is on " 'wronging one in his property rights by dishonest methods or schemes' and [it] 'usually signif[ies] the deprivation of something of value by trick, deceit, chicane or overreaching.' " *Carpenter*, 484 U.S. at 27 (citations omitted). If "scheme to defraud" is *not* limited to simple, face-to-face, misrepresentation fraud – as it is not, but as the Fifth Circuit's blanket rule presupposes – then requiring "reliance" and "inducement" or "target status" to establish the "proximate cause" nexus between "scheme to defraud" and "injury to business or

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[16] *Accord UnitedHealth Care Corp.*, 88 F.3d at 571 n.5 and 572 (RICO mail fraud; theft of insurance premiums; detrimental reliance not required; causation shown).

property" under RICO is simply unintelligible. In a particular instance, they may be, of course, *sufficient*, but they are not *necessary* in *all* instances, as the decisions of the other circuits so aptly show. In short, RICO added "proximate cause" to "scheme to defraud", but "proximate cause" may be established in a variety of ways.[17]

C. The Fifth Circuit's Decision Is Consistent With The Decisions Of The Sixth And Seventh Circuits.

The Fifth Circuit's opinion is not, however, an aberration. Its precise formulation of a "reliance and inducement or target" rule is also found, most recently, in the Seventh Circuit's decision in *Insolia v. Philip Morris, Inc.*, 216 F.3d 596, 606 (7th Cir. 2000). *See also Reynolds v. East Dyer Dev. Co.*, 882 F.2d 1249, 1253 (7th Cir. 1989), which is correctly cited by the Fifth Circuit. (214 F.3d at 560 n.16; App. 7a) The Fifth Circuit's approach, if not the precise

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[17] The proper approach to "proximate cause" under RICO is found in this Court's jurisprudence under the antitrust statutes, as *Holmes* teaches. *Holmes*, 503 U.S. at 664-70 (citing AGC). In *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 495-96 (1988) (antitrust), this Court, for example, held that a manufacturer of plastic conduit could sue a manufacturer of steel conduit that improperly influenced a trade association, which, in turn, promulgated a safety code that contained false product safety information about plastic conduit, which, in turn, influenced market participants either not to use plastic conduit or to disapprove its use by others. The Fifth Circuit's blanket rule for "proximate cause" cannot be squared with *Allied Tube & Conduit Corp.* In *Allied* "proximate cause" was established on general grounds – without a requirement of reliance or inducement or target status. Reliance, inducement or target status is simply not, therefore, the *sine qua non* of "proximate cause" – under antitrust or RICO, as the other circuits properly recognize.

rule, is also found in Sixth Circuit decisions. *See, e.g., Central Distributors of Beer, Inc. v. Conn.*, 5 F.3d 181, 184 (6th Cir. 1993), which the Court also correctly cites. (214 F.3d at 560 n.16; App. 7a). This is, therefore, the square conflict in the decisions of the courts of appeal that this Court must resolve to set right "scheme to defraud" litigation under RICO.

II. CONTAINING A DUAL CRIMINAL AND CIVIL ENFORCEMENT MECHANISM, RICO REFLECTS CONGRESS' CONSIDERED JUDGMENT HOW ENTERPRISE CRIMINALITY SHOULD BE TREATED; THE FIFTH CIRCUIT'S PROXIMATE CAUSE TEST, IN CONFLICT WITH OTHER CIRCUITS, UNDERMINES RICO'S FAIRNESS AND EFFECTIVENESS IN THE NATION'S MARKETPLACE.

In 1970, Congress enacted the Organized Crime Control Act, Title IX of which is known as"RICO."[18] Title IX was drafted to deal with "enterprise criminality."[19] It embodied a novel approach to the administration of justice. "[C]oncepts such as RICO 'enterprise' and 'pattern of racketeering activity' were simply unknown to common law." *Agency Holding Corp. v. Malley-Duff & Associates*, 483 U.S. 143, 150 (1987). 18 U.S.C. § 1961(4) ("enterprise") was drafted in the form of an ostensive definition; it is not denotative. "Enterprise" includes illicit as well as licit entities. *United States v. Turkette*, 452

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[18] 18 U.S.C. § 1961 *et seq.*

[19] *United States v. Cauble*, 706 F.2d 1322, 1330 (5th Cir. 1983) (" 'enterprise criminality' " consists of " 'all types of organized criminal behavior [ranging] from simple political corruption to sophisticated white-collar crime schemes to traditional Mafia-type endeavors' ") (citation omitted).

U.S. 576, 580-93 (1981).[20] 18 U.S.C. § 1961(5) ("pattern") was not drafted in the form of definition; it is a limitation. *H.J. Inc.*, 492 U.S. 237.[21]

Like the antitrust statutes, Congress deliberately used in RICO "a generality and adaptability [of language] comparable to that found to be desirable in constitutional provisions." *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933). Congress "drafted RICO broadly enough to encompass a wide range of criminal activity, taking many different forms and likely to attract a broad array of perpetrators operating in many different ways." *H.J. Inc.*, 492 U.S. at 248-49. "The occasion for Congress' action was the perceived need to combat organized crime. But Congress for cogent reasons chose to enact a more general statute . . . ". *Id.* at 248.

The scope of RICO is best seen by examining its antitrust parentage. *Holmes*, 503 U.S. at 267. Like RICO, the antitrust statutes contain a dual system of enforcement – criminal and civil. This Court teaches that the civil antitrust "treble-damage remedy is needed precisely for the purpose of encouraging *private* challenges to antitrust violations." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) (emphasis in original). Such "private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws." *Minnesota Mining & Mfg. Co., v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 317 (1965).

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[20] *See also N.O.W.*, 510 U.S. at 259 n.5 ("enterprise" may play different roles under RICO, not merely "plaintiff" or "defendant," including "prize," "instrument," "victim" or "perpetrator") (citation omitted).

[21] "Pattern" reflects relationship and continuity. *See, e.g., Ahmad v. Rosenblatt*, 118 F.3d 886, 889 (1st Cir. 1997) (Breyer, J.) (single incident not "pattern"; "pattern" reflects: (1) relationship of purposes, participants, and methods, and (2) continued activity or its threat).

Private suits "provide a significant supplement to the limited resources available to the Department of Justice" to enforce the antitrust statutes. *Reiter*, 442 U.S. at 344.[22] Like the antitrust laws, RICO creates "a private enforcement mechanism that . . . deter[s] violators[,] deprive[s] them of the fruits of their illegal actions, and . . . provide[s] ample compensation to the victims of [RICO] violations." *Blue Shield of VA*, 457 U.S. at 472 (citing *Pfizer Inc. v. India*, 434 U.S. 308, 313-14 (1978)).[23]

Blue Shield, too, teaches that "artificial limitations" are not to be "engrafted" on the private treble damage remedy of antitrust; if it is to be limited, that limitation must be consistent with, not frustrate, its antitrust (or RICO) purposes; its language should, therefore, be given its "naturally broad and inclusive meaning." *Id.* It is, in short, the policies of the antitrust statutes (or RICO) that trump – or ought to trump – not yield to, other sources of law. *Id.* at 485.

Indeed, RICO makes the principle of its liberal construction a matter of *express* statutory language. Like the antitrust laws, "RICO is to be read broadly." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 497-98 (1984) (citing 84 Stat. 947) ("liberally construed to effectuate its remedial purposes"); *American Society of Mechanical Engineers, Inc.*

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[22] *See* Michael Block *et al.*, *The Deterrent Effect of Antitrust Enforcement*, 89 JOURNAL OF POL. ECONOMY 429, 440 (1981) ("Neither imprisonment nor monetary penalties pose . . . a credible threat. . . . [T]he deterrent effect . . . [comes] from . . . the likelihood of an award of private treble damages . . . ").

[23] *Accord Rotella v. Wood*, 528 U.S. 549, 120 S. Ct. at 1982 (2000) (RICO) ("not merely to compensate victims but to turn them into prosecutors, 'private attorneys general,' dedicated to eliminating racketeering activity.'*** The provision for treble damages is accordingly justified by the expected benefit of suppressing racketeering. . . . ") (citations omitted).

v. Hydrolevel Corp., 456 U.S. 556, 568-69 (1982) (antitrust) ("broad, remedial effect"; narrow "Victorian common law" does not limit treble damage recovery) (citing *Perma Life Mufflers, Inc., v. Int'l Parts Corp.*, 392 U.S. 134, 138-39 (1968) (the "ancient" defense of *in pari delicto* not applied under antitrust law)).

RICO and the antitrust statutes, therefore, are well-integrated. "There are three possible kinds of force which a firm can resort to: violence (or threat of it), deception, or market power." CARL KAYSEN *et al.*, ANTITRUST POLICY 17 (1959). Antitrust laws properly focus on the third; RICO properly focuses on the first two. Antitrust laws guarantee a *free* market; RICO guarantees a market characterized by *integrity* – physical and fiscal.[24]

The significance of this Petition to the fair and effective administration of RICO can hardly be overstated. A substantial portion of civil RICO litigation enforces Federal "scheme to defraud" standards. *Agency Holding Corp.*, 483 U.S. at 149. Because of RICO's "pattern" element, an enforcement action can, more often than not, be brought in more than one circuit. *See* 18 U.S.C. § 1965 (nationwide venue and service of process provisions). Knowledgeable litigants can, therefore, "choose" the "best" circuit in which to bring a RICO case based, not on the merits of their case, but on conflicts in circuit court

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[24] The parallels between antitrust and RICO are reflected in the data on the relation between criminal and civil litigation. Between 1960 and 1980, of the civil and criminal cases brought under the antitrust provision by the Government or private parties, 84% were instituted by private plaintiffs. UNITED STATES DEP'T OF JUSTICE, U.S. DEPARTMENT OF JUSTICE SOURCE BOOK OF CRIMINAL JUSTICE STATISTICS 431 (1981). The data on the ratio of criminal to civil RICO suits are now roughly the same. *See* Blakey *et al., Myths That Bolster Efforts to Rewrite RICO*, 43 VAND. L. REV. 851, 1020 (1990)

law, not an edifying picture in a *national* system of law. Not only is the specter of initial forum shopping raised, but also motions to transfer that have as their real purpose to obtain more favorable circuit law, not a more convenient forum, can be squarely foreseen.[25] This litigation could have been brought in *any* circuit, but Houston, Texas, which was Respondent Shell's principal place of business and the center of the "scheme to defraud," is where it belonged, and it is where it was rightly brought by Petitioners. (App. 48a) The result achieved should not have depended on the choice of forum in a *national* system of justice.

Conflicts between circuits on these aspects of "proximate cause" – an issue that is present in *all* civil RICO actions – are simply intolerable. These matters have been fully briefed and argued in the circuit courts in numerous appeals; the positions of the circuits are now hardened. It is time for this Court to settle these important issues, which are today so intransigently in conflict. These conflicts – just about a decade old since *Holmes* – are, moreover, hardly new to the law. Almost forty years ago, Prosser authoritatively surveyed many of them in the law generally in *Misrepresentation and Third Persons*, 19 VAND. L. REV. 231 (1964). The considerations -- old and new – supporting the various positions between the circuits are well-articulated. To permit them to fester any longer is not fair to litigants, and it undermines RICO effectiveness in the Nation's marketplace. Here, if anywhere, uniformity of *Federal* law is in the interest of justice.

Because Congress found that under the law in 1970 "the sanctions and remedies available" were "unnecessarily limited in scope and impact," 84 Stat. 923, it

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[25] *Tel-Phonic Services, Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1338 (5th Cir. 1992) (law of transferee circuit is applied).

enacted RICO to provide enhanced criminal and civil sanctions, mandated their liberal construction to "effectuate . . . [RICO's] remedial purposes," 84 Stat. 947, and provided that its remedies, criminal and civil, Federal and state, were to co-exist. *Id.* ("[n]othing in this title shall supersede" other legal remedies); *Haroco Inc. v. Am. Nat'l Bk. & Trust Co. of Chicago*, 747 F.2d 384, 392 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985). ("Congress enacted RICO in order to supplement, not supplant the available remedies since it thought those remedies offered too little protection for the victims"), *aff'd on other grounds*, 473 U.S. 606 (1985). The various sanctions under RICO's innovative enforcement design include fines, imprisonment, forfeiture, injunctions, and treble damage relief for "person[s] injured" in their "business or property" by reason of a "violation" of the statute. *See* 18 U.S.C. §§ 1963, 1964. They must be permitted to work together – fairly, effectively, and uniformly – throughout the Nation.

No court ought now reweigh – under the guise of an "interpretation" of RICO – the "balance" Congress struck in 1970 between "opposing policy arguments," *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 623 (1978), strike a new "compromise," *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980), or rewrite a "carefully crafted piece of legislation," *Iannelli v. United States*, 420 U.S. 770, 789 (1975). In 1970, Congress "announce[d its] . . . considered judgment." *City of Milwaukee v. Illinois*, 451 U.S. 304, 315 (1981) (quoting *Mobil Oil Corp.*, 436 U.S. at 625). Congress still sits; it can – as it has – amended RICO. *See Reflections* at 1676-1702 (tracing the enactment securities reform legislation). It has *not* enacted *general* limitations on RICO's enforcement of "scheme to defraud." That ought to end the matter, absent constitutional considerations, which are not implicated here. *Turkette*, 452 U.S. at 587 ("There

is no argument that Congress acted beyond its power. . . . That being the case, the courts are without authority to restrict the application of . . . [RICO]"). Justice Cardozo put it well: "[A court's] duty is done when . . . [it] enforce[s] the law as it is written." *Techt*, 229 N.Y. at 28-29, 128 N.E. at 186.

CONCLUSION

For these reasons, Petitioners respectfully urge this Court to grant their Petition for a Writ of Certiorari and to resolve this intolerable conflict between the circuits on RICO's interpretation where a "scheme to defraud" is fairly alleged.

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No. _____

In The

Supreme Court of the United States

SUMMIT PROPERTIES, INC. et al.,

Petitioners,

v.

HOECHST CELANESE CORP., formerly known as CELANESE CORP., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-20622

SUMMIT PROPERTIES INC.; SUMMIT PROPERTIES LP; SUMMIT PROPERTIES PARTNERSHIP LP; STONY POINT/SUMMIT LP; MCGREGOR/MCGUIRE LP; HENDERSON/MCGUIRE PARTNERS LP; OAK RIDGE/MCGUIRE PARTNERS LP; WAVERLY PLACE/ SUMMIT PARTNERS LP,

Plaintiffs - Appellants,

versus

HOECHST CELANESE CORP., formerly known as Celanese Corporation; HOECHST CORPORATION; E. I. DUPONT DE NEMOURS, AND CO.; SHELL OIL COMPANY, doing business as Shell Chemical Company; VANGUARD PLASTICS INC.; BOW INDUSTRIAL CORP.; HOUSEHOLD INTERNATIONAL INC.,

Defendants - Appellees.

Appeal from the United States District Court
For the Southern District of Texas

(Filed Jun. 07, 2000)

Before HIGGINBOTHAM and PARKER, Circuit Judges, and WARD,* District Judge.

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*District Judge of the Eastern District of Texas, sitting by designation.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Today we are invited to read RICO as establishing a federal products liability scheme complete with treble damages and attorney fees for the benefit of end-users of defective products who never relied on manufacturers' alleged misrepresentations of product quality. We are unpersuaded that RICO can be extended so far by such a marriage of distinct duties and liability regimes. Consequently, we AFFIRM the dismissal of the plaintiffs' RICO claims against the defendant manufacturers of polybutylene plumbing systems and components.

I

The plaintiffs own properties in which polybutylene (PB) plumbing systems were installed. PB is a by-product of oil-refining. In the 1970s, Shell Oil Company purchased the exclusive right to sell PB in the U.S. for a 10-year period. Shell then sold PB resin pellets to pipe extruders, such as Vanguard and Bow, who made tubing from the pellets. The defendants in this suit are manufacturers who sold either PB plumbing systems or their components parts, including Shell, DuPont, Hoechst Celanese, Household International, Vanguard, and Bow.

The plaintiffs contend that the defendants manufactured and marketed these systems and components through a complex scheme to defraud. The claims revolve around core allegations that the defendants made knowingly false claims in marketing PB, including assertions that (1) it is suitable for use as a hot and cold potable water plumbing systems; (2) it will last 50 years; (3) it

will not corrode; (4) it is easy, reliable, simple, proven and fast; and (5) it will not occasion serious service problems.

The truth, plaintiffs allege, is that PB plumbing is worse than worthless, that it not only fails to perform its intended function, but also that it causes severe property damage; that PB's inherent defects render it unsuitable for use as a water distribution system, including the fact that after installation, such systems degrade, crack, leak, and spray water.

The plaintiffs allege that the defendants engaged in a conspiracy to defraud by directing a massive, fraudulent marketing plan designed to make PB the "material of choice" in the plumbing market, so that by the end of Shell's ten-year period of exclusive rights, Shell would have a commanding market position. This marketing campaign was directed at building code approval officials, members of the building industry such as builders and plumbers, and other consumers.

II

The plaintiffs filed suit in district court alleging violations of civil RICO.[1] The district court granted the defendants' Rule 12(b)(6) motion to dismiss because the plaintiffs conceded that they did not detrimentally rely on any of the defendants' allegedly fraudulent misrepresentations that served as the basis for the RICO claims. The district court held that such reliance is a necessary predicate for establishing proximate cause under RICO. It

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[1] 18 U.S.C. § 1961 *et seq.*

denied a motion for reconsideration, and the plaintiffs appealed.

III

RICO provides that "[a]ny person injured in his business or property *by reason of* a violation of section 1962 of this chapter may sue therefor. . . . "[2] The Supreme Court, in *Holmes v. Securities Investor Protection Corp.*,[3] explicitly confirmed that the "by reason of" language in RICO requires a causal connection between the predicate mail or wire fraud and a plaintiff's injury that includes "but for" and "proximate" causation.[4]

The question before us is whether a plaintiff's reliance on the predicate mail or wire fraud is necessary in order to establish proximate causation. In *Armco Industries Credit Corp. v. SLT Warehouse Co.*,[5] this court distinguished mail fraud under RICO from common law fraud and stated that "to find a *violation* of the federal mail fraud statute it is not necessary that the victim have detrimentally relied on the mailed misrepresentations."[6] Ours is a different question.

It is true that the court in *Armco* found no error when the trial judge refused to instruct the jury that a showing of reliance was necessary in order to establish proximate

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[2] 18 U.S.C. § 1964(c) (emphasis added).

[3] 503 U.S. 258 (1992).

[4] *See id.* at 265-68.

[5] 782 F.2d 475 (5th Cir. 1986).

[6] *Id.* at 482 (emphasis added).

causation under RICO.[7] It is equally the case that the court observed that reliance is not an element of the underlying offense of mail fraud, and ignored the issue of whether such reliance would be necessary in order to prove proximate causation.[8] *Armco* aside, these issues are distinct: the government can punish unsuccessful schemes to defraud because the underlying mail fraud violation does not require reliance, but a civil plaintiff "faces an additional hurdle" and must show an injury caused "by reason of" the violation.[9]

When *Armco* was decided, the Fifth Circuit had not yet interpreted the "by reason of" language of 18 U.S.C. § 1964(c) to impose a proximate causation requirement,[10] and this circuit still allowed recovery for more indirect injuries.[11] Since that time, the Fifth Circuit in *Zervas v.*

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[7] *See id.*

[8] *See id.* at 481-82.

[9] *Pelletier v. Zweifel*, 921 F.2d 1465, 1498, 1498-99 (11th Cir. 1991).

[10] *See Zervas v. Faulkner*, 861 F.2d 823, 834 (5th Cir. 1988) (adopting the proximate causation requirement and joining the Second, Fourth, and Seventh Circuits); *see also id.* (noting that a similar approach was taken in *National Enterprises, Inc. v. Mellon Financial Services Corp.*, 847 F.2d 251 (5th Cir. 1988), but that the term "proximate cause" was not employed).

[11] *See Ocean Energy II, Inc. v. Alexander & Alexander*, 868 F.2d 740, 744 (5th Cir. 1989) ("[W]e [have] rejected the position taken by the Seventh, Eleventh and possibly Third Circuits interpreting the language in [*Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985)] as allowing recovery only for direct injuries.").

Faulkner[12] and the Supreme Court in *Holmes* have explicitly adopted a traditional proximate causation requirement.[13] *Armco* does not then answer the question before us: whether reliance is necessary to establish proximate cause under RICO. To hold otherwise would imply that *Armco* silently imposed a proximate causation requirement that was not explicitly adopted until several years hence in *Zervas* and *Holmes*.[14] To the extent it held that proximate cause was not required, it has been overturned by *Holmes*.

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[12] 861 F.2d 823 (5th Cir. Dec. 15, 1988).

[13] *Holmes*, 503 U.S. at 265-68; *Zervas*, 861 F.2d at 834.

[14] Since *Holmes* this circuit has stated that "reliance is not an element of mail fraud" for RICO liability. *See Akin v. Q-L Investments, Inc.*, 959 F.2d 521, 533 (5th Cir. 1992). In *Akin*, however, this court noted only that reliance is not an element of an underlying mail or wire fraud violation. *See id.* (citing *Abell v. Potomac Ins. Co.*, 858 F.2d 1104, 1129 (5th Cir. Nov. 2, 1988)). Whether the plaintiff's damages were proximately caused by reason of such violation was not at issue. *See id.*

Abell cited *Armco* for the proposition that reliance is not an element of the underlying mail or wire fraud. *See Abell*, 858 F.2d at 1129. Like *Armco*, *Abell* was decided before *Zervas* and did not discuss the issue of whether reliance is necessary for proximate causation. Instead of arguing proximate cause, the defendant claimed that "the evidence did not establish . . . *any* causal connection between the plaintiffs' . . . injuries and [the defendant's] misrepresentations." *Id.* at 1129 (emphasis added). The Supreme Court subsequently vacated *Abell*, *see Fryar v. Abell*, 492 U.S. 914 (1989), and on remand this court remanded the case to the district court for reconsideration, *see Abell v. Potomac Ins. Co.*, 884 F.2d 196 (5th Cir. 1989). In the second appeal to this court, issues related to reliance did not arise. *See Abell v. Potomac Ins. Co.*, 946 F.2d 1160 (5th Cir. 1991).

On appeal, the plaintiffs do not quarrel with the district court's acceptance of their concession that they "did not rely on anything Defendants said or published in purchasing their properties."[15] Instead, the plaintiffs steadfastly maintain that individual acts of reliance are simply unnecessary in order to recover for damages resulting from civil RICO fraud. Most other circuits, however, require a showing of detrimental reliance by the plaintiff,[16] which is consistent with *Holmes'* admonition

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[15] Plaintiffs' Memorandum of Law in Reply to Various Motions and Memoranda of Defendants, at 24 ¶ 43 [R. 1198], *quoted in* Memorandum Opinion and Order, at 2 [R. 1241]; *see also* Brief of Appellants, at 6 ("Because it did not have to do so, Summit did not claim that it relied on [the defendants'] misrepresentations and omissions regarding [the] inherently defective and worthless plumbing system.").

The plaintiffs only remaining allegations of reliance involved the "technically accurate" representations by various entities who stated that the plaintiffs' properties confirmed [sic] to the local building codes. *See* Plaintiffs' Second Amended Complaint, at 24 ¶ 73 [R. 892]; Plaintiffs' Memorandum of Law in reply to Various Motions and Memoranda of Defendants, at 25 ¶ 45 [R. 1197]. Reliance on technically accurate representations by entities other than the defendants is not reliance upon misrepresentations by the defendants.

[16] *See, e.g., Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 746-47 (3d Cir. 1996); *Chisolm v. TranSouth Fin. Corp.*, 95 F.3d 331, 337 (4th Cir. 1996); *Appletree Square I v. W.R. Grace & Co.*, 29 F.3d 1283, 1286 (8th Cir. 1994); *Central Distribs. of Beer, Inc. v. Conn*, 5 F.3d 181, 184 (6th Cir. 1993); *Pelletier v. Zweifel*, 921 F.2d 1465, 1499-500 (11th Cir. 1991); *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1311 (2d Cir. 1990); *Reynolds v. East Dyer Dev. Co.*, 882 F.2d 1249, 1253 (7th Cir. 1989).

that federal courts employ traditional notions of proximate cause when assessing the nexus between a plaintiff's injuries and the underlying RICO violation.[17]

The rationale for requiring reliance in cases such as this one becomes clear in the light cast by the distinction between causation as an element of a claim for fraud and producing cause as an element of a claim for products liability.[18] The linkage between design defect and injury is between the *defect* and the injury. With a claim for fraud, however, the linkage is between the defendants' *fraud* and the injury.

As a product travels in the stream of commerce, inherent defects are carried with it, but fraudulent statements are not. With the abolition of privity requirements, injuries produced by product defect may be actionable by all users including those remote in the distribution chain from a defendant manufacturer. The causal connection between a misrepresentation and a subsequent harm, however, vanishes once the product travels beyond the entity who actually relied on the representation when making the purchasing decision.

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[17] *See Holmes*, 503 U.S. at 268.

[18] To recover under Texas products liability law, a design defect must be a "producing cause" of injury. *See* Tex.Civ.Prac. & Rem.Code Ann. § 82.005(a). A producing cause is "an efficient, exciting, or contributing cause, which in a natural sequence, produced injuries or damages complained of, if any." *Rourke v. Garza*, 530 S.W.2d 794, 801 (Tex.1975). Our reference to Texas law, however, is for purposes of illustration only.

In other words, even if intermediary builders, plumbers, code officials, or prior owners relied on the defendants' alleged misrepresentations when choosing to use or approve PB plumbing, that does not tell us whether the defendants' fraud proximately caused the plaintiffs' injuries, for which the defect was a producing cause. At best, any fraud during the sale of those products proximately injured only those initial purchasers who relied on the alleged misrepresentations, since the fraud facilitated a sale that might not otherwise have been made.

Of course, if the sales would not have occurred absent the fraud, the fraud would have been a "but-for" cause of the plaintiffs' injuries.[19] Nevertheless, the plaintiffs came into possession of PB systems without relying on the alleged fraud. Whether they received their systems from the manufacturers or from prior property owners, any past fraud was not a proximate cause of the plaintiffs' resulting injuries since fraud did not induce the purchase transactions.[20]

This is only to recognize the distinct character of claims for fraud and claims for defective products resting on the law of products liability. In general, fraud

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[19] If the relevant decisionmakers knew the limitations of the product but would have bought it anyway because of its low price, for example, the fraud would not have been a "but-for" cause of the plaintiffs' damages.

[20] *See Johnson Enterprises of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1318 (11th Cir. 1998) (noting that a plaintiff's injury is not proximately caused by a defendant's misrepresentations when the injury results only from the detrimental reliance of a third party).

addresses liability between persons with direct relationships – assured by the requirement that a plaintiff has either been the target of a fraud or has relied upon the fraudulent conduct of the defendants. The Fourth Circuit, recognizing the target wing of these twin limits of liability, held open the possibility that a plaintiff company may not need to show reliance when a competitor lured the plaintiff's customers away by fraud directed at the plaintiff's customers.[21] In the current case, for example, the defendants' competitors might recover for injuries to competitive position, but that circumstance is of no aid to these plaintiffs. Accepting as claimed that the defendants' strategy may have been to gain market share by fraud in the initial sale of PB components, it is not contended that these particular plaintiffs were the targets of a scheme to defraud accomplished by defrauding others.[22]

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[21] *See Mid Atlantic Telecom, Inc. v. Long Distance Services., Inc.*, 18 F.3d 260, 263-64 (4th Cir. 1994).

[22] Similarly, we do not think the current situation is similar to one discussed in *Holmes*, where the Court left open the possibility that the customers of an insolvent brokerage might recover under RICO for losses stemming from a series of fraudulent brokerage transactions despite the fact that those customers did not in any sense "rely" on a misrepresentation. *See* 503 U.S. at 272 n.19.

In that situation, the fraudulent brokerage transactions imposed immediate risks on the brokerage's customers by increasing the likelihood of the brokerage's insolvency, even if the conspirators did not intend such risks to fall on those customers through their sham transactions.

Nevertheless, when an action poses a high and foreseeable risk on a third party, we may view the resulting injury as deliberate for the purpose of liability. *See, e.g., Matter of EDC, Inc.*, 930 F.2d 1275, 1279 (7th Cir. 1991) (Posner, J.). In that sense,

Plaintiffs' able counsel has understandably fled to the "fraud on the market" theory of constructive reliance, a theory born in securities litigation. It assumes that prices in an efficient market incorporate the relative importance of public information, whether that information is true or false.[23] If publicly announced information regarding a security is fraudulent, a subsequent purchaser of that security from the market is said to have constructively relied on the fraudulent statements because they were incorporated into the market price. The case proceeds despite the fact that the defendant and the purchaser had no direct relationship and reliance upon the false statements could not be shown. This because under the theory, the market as an efficient translator of data to price acted as an intermediary, connecting plaintiff and defendant.

No court has accepted the use of this theory outside of the context of securities fraud, and one circuit has expressly rejected its use in the context of a similar civil RICO case.[24] An efficient market is a critical element of a market's role as an intermediary. There is no pretense of

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the brokerage customers may be seen as direct and contemporaneous victims of the fraudulent scheme and within the scope of the already noted exception.

In the present case, however, the plaintiffs' risks of injuries did not arise as direct and contemporaneous results of any alleged fraud, but instead arose only later, through the purchases of allegedly defective plumbing by transactions which were not tainted with fraud.

[23] *See Basic Inc. v. Levinson*, 485 U.S. 224, 244-47 (1988) (citing *In re LTV Sec. Litig.*, 88 F.R.D. 134, 143 (N.D.Tex.1980)).

[24] *See Appletree Square I v. W.R. Grace & Co.*, 29 F.3d 1283, 1287 (8th Cir. 1994).

such a market here and the fraud on the market doctrine is not applicable.

IV

In sum, when civil RICO damages are sought for injuries resulting from fraud, a general requirement of reliance by the plaintiff is a commonsense liability limitation. To hold otherwise would allow the threat of treble damages and attorney fees to infiltrate garden variety products liability cases whenever marketing promotions touted the merits of the products, even if no plaintiff relied on those representations. This is not a statement of our policy choice. We are not persuaded that by its "by reason of" phrase Congress intended such a federalization and escalation of the states' laws of product liability – laws that have hardly been proved to be anemic in their common law use of economic incentives to achieve desired social goals. The threshold reliance requirement is determinative in this case. We need not and do not reach other issues raised by the defendants. Agreeing with the district court, we AFFIRM its dismissal of this suit.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SUMMIT PROPERTIES, INC., *et al.*,	§	CIVIL ACTION NO. H-98-1954
Plaintiffs,	§	
vs.	§	
HOECHST-CELANESE CORPORATION, *et al.*,	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

(Filed July 9, 1999)

This civil RICO case is before the Court on Plaintiffs' Motion to Alter or Amend Judgment and for Reconsideration Under Rule 59(e) (Instrument No. 121), to which Defendants have filed their opposition. The Court has again reviewed the record in this case, as well as the applicable legal authorities. Based on this review, the Court **denies** Plaintiffs' Motion.

I. STANDARD FOR RULE 59(e) MOTION

Rule 59(e) of the Federal Rules of Civil Procedure is designed to "correct manifest errors of law or fact or to present newly discovered evidence." *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990); *Waltman v. International Paper Co.*, 875 F.2d 468, 473 (5th Cir. 1989). A district court considering a Rule 59(e) motion must strike

a proper balance between the need for finality in litigation and the need to render judgments based on all available evidence. *Lavespere v. Niagara Machine & Tool Works, Inc.*, 910 F.2d 167, 174 (5th Cir. 1990). A final judgment "generally will be set aside only to accommodate some new matter that could not have been asserted [before judgment]." *Briddle v. Scott*, 63 F.3d 364, 379-80 (5th Cir.), *cert. denied*, 516 U.S. 1033 (1995). A Rule 59 motion is not the "proper vehicle for rehashing old arguments. . . . " *Resolution Trust Corp. v. Holmes*, 846 F. Supp. 1310, 1316 (S.D. Tex. 1994).

II. ANALYSIS

Plaintiffs present no new arguments in support of their Motion. Instead, Plaintiffs again argue that reliance is not necessary to prevail on a civil RICO claim based on mail fraud or wire fraud. Plaintiffs again cite cases which hold that reliance is not a necessary element of a criminal mail fraud or wire fraud charge. Specifically, Plaintiffs continue to rely on *Armco Industrial Credit Corp. v. SLT Warehouse Co.*, 782 F.2d 475, 482 (5th Cir. 1986). Plaintiffs also cite *Neder v. United States*, 119 S.Ct. 1827 (1999), in which the United States Supreme Court noted that federal criminal charges of mail fraud and wire fraud do not require proof of justifiable reliance or damages. Plaintiffs, however, continue to ignore the distinction between the elements necessary to prove the civil RICO predicate act and the necessity to establish proximate causation.

As discussed more thoroughly in the Court's prior Memorandum and Opinion in this case, the proximate causation issue was thoroughly and persuasively

addressed by the Fourth Circuit in *Brandenburg v. Seidel*, 859 F.2d 1179 (4th Cir. 1988), and by the Eleventh Circuit in *Pelletier v. Zweifel*, 921 F.2d 1465 (11th Cir.), *cert. denied*, 502 U.S. 855 (1991). The United States Supreme Court, subsequent to the *Armco* decision, also held that civil RICO plaintiffs must prove that they were ***directly*** injured by the RICO violation. *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 270-74 (1992). Similarly, this Court held in *Heden v. Hill*, 937 F. Supp. 1230 (S.D. Tex. 1996), that a plaintiff cannot maintain a civil RICO claim based on mail fraud or wire fraud as the predicate acts absent allegations that the defendant made misrepresentations to the plaintiff, through the use of the mails or wires, and that the plaintiff relied on those misrepresentations to his detriment. *Heden*, 937 F. Supp. at 1243.

III. CONCLUSION AND ORDER

Based on the foregoing, the Court concludes that Plaintiffs have failed to present new or persuasive arguments in support of their Rule 59(e) Motion. The law regarding the necessary proof required of civil RICO plaintiffs is clear. Plaintiffs are correct that reliance is not required to establish the predicate act element of civil RICO, if the predicate act is either mail fraud or wire fraud. Plaintiffs must, however, satisfy the remaining elements of their civil RICO claim, including the proximate causation requirement. Accordingly, it is hereby

ORDERED that Plaintiffs' Motion to alter or Amend Judgment and for Reconsideration Under Rule 59(e) (Instrument No. 121) is **DENIED.**

SIGNED this 9 day of July, 1999, at Houston, Texas.

/s/ David Hittner
DAVID HITTNER
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SUMMIT PROPERTIES, INC., et al.,	§	**C.A. NO. H-98-1954**
Plaintiffs	§	**JURY TRIAL DEMANDED**
vs.	§	
HOECHST-CELANESE CORPORATION f/k/a/ CELANESE CORPORATION, et al.,	§	
Defendants	§	

NOTICE OF APPEAL TO A COURT OF APPEALS FROM A JUDGMENT OR ORDER OF A DISTRICT COURT

Notice is hereby given that SUMMIT PROPERTIES, INC., et al. ("All Plaintiffs") in the above named case appeals to the United States Court of Appeals for the Fifth Circuit from the *MEMORANDUM OPINION AND ORDER* and *FINAL ORDER OF DISMISSAL* dismissing All Plaintiffs' Civil RICO claims with prejudice pursuant to Rule 12(b)(6) and dismissing All Plaintiffs' state law claims without prejudice, entered in this action on May 24, 1999.

Respectfully submitted,

/s/ Barry L. Racusin
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State Bar #16451800
Federal ID #6168
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ATTORNEY FOR PLAINTIFFS

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above instrument has been served by certified mail, return receipt requested, on all parties identified on the attached Service List, on this the 24th day of June, 1999.

/s/ [Illegible]

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SUMMIT PROPERTIES, INC., *et al.*,	§	CIVIL ACTION NO. H-98-1954
Plaintiffs,	§	
vs.	§	
HOECHST-CELANESE CORPORATION, *et al.*,	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

(Filed May 24, 1999)

Plaintiffs are owners of commercial and residential properties in which polybutylene plumbing systems were installed. Defendants are either manufacturers of the component parts of the polybutylene plumbing systems or suppliers or raw material used in the plumbing systems. Plaintiffs have sued Defendants, alleging that Defendants violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("Civil RICO").

The case is now before the Court on Defendants' Motions to Dismiss (Instruments No. 99, No, 102, No. 103, No. 106, and No. 110), to which Plaintiffs have filed a consolidated response (Instrument No. 113).[1] The Court

---

[1] In their Resposne, Plaintiffs state that Defendants' Motions to Dismiss should be denied because Judge Norman Black denied similar motions to dismiss in *Villager Lodge, Inc. v.*

has thoroughly reviewed the motions and accompanying briefs, Plaintiffs' response, the Second Amended Complaint, Plaintiffs' RICO Statement, and the applicable legal authorities. Based on this review, the Court **grants** Defendants' motions to dismiss the Civil RICO claim. Having dismissed the only federal claim and absent allegations of complete diversity of citizenship, the Court declines to exercise supplemental jurisdiction over Plaintiffs' state law claims which are dismissed without prejudice.

I. PLAINTIFFS' ALLEGATIONS

Plaintiffs allege that Defendant Shell Chemical Company organized various manufacturers of polybutylene plumbing and component parts into an enterprise which Plaintiffs refer to as the "PB Enterprise." Plaintiffs allege that the purpose of the PB Enterprise was to promote polybutylene plumbing systems, create an enormous demand for the systems, and cause polybutylene to become the material of choice for plumbing and potable water service distribution systems.

Plaintiffs allege that, in furtherance of PB Enterprise's goal to promote polybutylene plumbing systems, Defendants made material misrepresentations to building

---

Hoechst-Celanese Corp., Civil Action No. 96-3341. The Court notes that Judge Black denied the motions to dismiss, not on the merits, but on unspecified "infirmities in the factual basis supporting Defendants' motions to dismiss the civil RICO claims." *Villager Lodge*, Civil Action No. 96-3341, Instrument No. 109.

code entities, builders, and plumbers concerning the attributes of the systems. Plaintiffs concede that they "did not rely on anything Defendants said or published in purchasing their properties. . . . " Response, Instrument No. 113, at 24. Instead, Plaintiffs allege that they relief on the building inspectors who told them that the properties' plumbing systems satisfied local building codes.

Defendants filed motions to dismiss, arguing *inter alia* that Plaintiffs' allegations were insufficient to support the proximate causation requirement of their Civil RICO claim.

II. STANDARD FOR MOTION TO DISMISS

Rule 12(b)(6) allows for dismissal if a plaintiff fails "to state a claim upon which relief may be granted." Rule 12(b)(6) dismissal "is appropriate only if there is no set of facts that could be proven consistent with the allegations in the complaint that would entitle the plaintiff to relief." *Power Entertainment, Inc. v. National Football League Properties, Inc.*, 151 F.3d 247, 249 (5th Cir. 1998). The factual allegations "must be reviewed in the light most favorable to the plaintiff." *Piotrowski v. City of Houston*, 51 F.3d 512, 514 (5th Cir. 1995). Unlike motions for summary judgment, the Rule 12(b)(6) motion "only tests whether the claim has been adequately stated in the complaint." *Doe v. Dallas Independent School Dist.*, 153 F.3d 211, 220 (5th Cir. 1998).

III. ANALYSIS

The Civil RICO statute requires the plaintiff to prove that he was "injured in his business or property by reason of a violation of section 1962." 18 U.S.C. § 1964. The clear language of the statute imposes three separate requirements: (1) injury to the plaintiff's business or property; (2) proximate causation ("by reason of"); and (3) the underlying wrong (the section 1962 violation). The Fifth Circuit has held that proof of the underlying wrong, if mail or wire fraud, does not require proof of detrimental reliance. *Armco Industrial Credit Corp. v. SLT Warehouse Co.*, 782 F.2d 475, 482 (5th Cir. 1986). The Fifth Circuit has not addressed, however, the issue of reliance as an element of the proximate cause requirement.[2]

The proximate causation issue was thoroughly and persuasively addressed by the Fourth Circuit in *Brandenburg v. Seidel*, 859 F.2d 1179 (4th Cir. 1988), and by the Eleventh Circuit in *Pelletier v. Zweifel*, 921 F.2d 1465 (11th Cir.), *cert. denied*, 502 U.S 855 (1991). In *Brandenburg*, the Fourth Circuit held that civil RICO plaintiffs who base their claim on predicate acts of mail or wire fraud must allege both that they detrimentally relied on the fraudulent statements and that the fraudulent statements were

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[2] The Fifth Circuit stated in *Khurana v. Innovative Health Care Systems, Inc.* that the proximate cause requirement may be satisfied by proof of "reliance on the predicate fraud act." The Fifth Circuit's decision was subsequently vacated and the appeal dismissed as moot. *Khurana v. Innovative Health Care Systems, Inc.*, 130 F.3d 143, 151 (5th cir. 1997), *cert. granted and judgment vacated*, 119 S. Ct. 442 (1998).

the proximate cause of the alleged injury to their property or business. *Brandenburg*, 859 F.2d at 1188-90. In *Pelletier*, the Eleventh Circuit held that "when the alleged predicate act is mail or wire fraud, the plaintiff must have been a target of the scheme to defraud and must have relied to his detriment on misrepresentations made in furtherance of that scheme." *Pelletier*, 921 F.2d at 1499-1500. *See also Lifschultz Fast Freight, Inc. v. Consolidated Freightways Corp.*, 805 F. Supp. 1277, 1291-92 (D.S.C. 1992) (no proximate cause because the "alleged predicate acts were all directed at third parties"), *aff'd*, 998 F.2d 1009 (4th Cir.), *cert. denied*, 510 U.S. 993 (1993).

This Court previously held in *Heden v. Hill*, 937 F. Supp. 1230 (S.D. Tex. 1996), that a plaintiff cannot maintain a Civil RICO claim absent allegations that the defendant made misrepresentations to the plaintiff, through the use of the mails or wires, and that the plaintiff relied on those misrepresentations to his detriment. *Heden*, 937 F. Supp. at 1243. In *Heden*, the plaintiff could not maintain his Civil RICO claim because there were no alleged misrepresentations made to him and relied upon by him. *Id.* Instead, the plaintiff in *Heden* claimed that misrepresentations to third parties injured him in his business or property. *Id.*

Similarly, in this case Plaintiffs do not allege that fraudulent communications through mail and wire were directed to them and do not allege that they relied on any of the alleged misrepresentations to third parties. Instead, Plaintiffs allege that they relied on building inspectors who reported that the polybutylene plumbing systems satisfied building codes which had been established

based on material misrepresentations to the building code entities.

The Court concludes, based on its review of the civil RICO statute and the cases cited herein, that absent an allegation that Defendant made material misrepresentations to Plaintiffs and that Plaintiffs relief on the mail and wire fraud on which the Civil RICO claims are predicated, Plaintiffs cannot satisfy the proximate causation requirement for purposes of Civil RICO. As a result, Plaintiffs Civil RICO claim must be dismissed.

Under 28 U.S.C. § 1367(c)(3), the Court declines to exercise supplemental jurisdiction over Plaintiffs' pendent state law claims. These matters are more properly dealt with in the state courts. *See Parker & Parsley Petroleum Co. v. Dresser Industries,* 972 F.2d 580, 585 (5th Cir. 1992) ("Out general rule is to dismiss state claims when the federal claims to which they are pendent are dismissed.").

IV. CONCLUSION AND ORDER

Based on the foregoing, the Court concludes that Plaintiffs have failed to state a claim under the RICO statute. Accordingly, it is hereby

ORDERED that Defendants' Motions to Dismiss (Instruments No. 99, No. 102, No. 103, No. 106, and No. 110) are **GRANTED** as to Plaintiffs' Civil RICO claim, which will be DISMISSED WITH PREJUDICE by separate order.

IT IS FURTHER **ORDERED** that Plaintiffs' state law claims are DISMISSED WITHOUT PREJUDICE to being

refiled in the appropriate state court. Plaintiffs should take note that the period of limitations for the dismissed state claims is tolled for an additional period of thirty (30) days after entry of the Court's Final Order of Dismissal unless state law provides for a longer tolling period. 28 U.S.C. § 1367(d).

SIGNED this 21 day of May, 1999, at Houston Texas.

/s/ David Hittner
DAVID HITTNER
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SUMMIT PROPERTIES, INC., *et al.*,	§	CIVIL ACTION NO. H-98-1954
Plaintiffs,	§	
vs.	§	
HOECHST-CELANESE CORPORATION, *et al.*,	§	
Defendants.	§	

FINAL ORDER OF DISMISSAL

(Filed May 24, 1999)

In accordance with the Memorandum Opinion and Order issued this day, it is hereby

ORDERED that Defendants' Motions to Dismiss (Instruments No. 99, No. 102, No. 103, No. 106, and No. 110) are **GRANTED** as to Plaintiffs' Civil RICO claim, which is DISMISSED WITH PREJUDICE. Plaintiffs' state law claims are DISMISSED WITHOUT PREJUDICE to Plaintiffs' refiling the claims in the appropriate state court.

THIS IS A FINAL ORDER OF DISMISSAL.

SIGNED this 21 day of May, 1999, at Houston, Texas.

/s/ David Hittner
DAVID HITTNER
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SUMMIT PROPERTIES, INC., *et al.*,	§	
Plaintiffs,	§	CIVIL ACTION NO.
vs.	§	H-98-1954
HOECHST-CELANESE CORPORATION, *et al.*,	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

(Filed May 24, 1999)

Plaintiffs are owners of commercial and residential properties in which polybutylene plumbing systems were installed. Defendants are either manufacturers of the component parts of the polybutylene plumbing systems or suppliers or raw material used in the plumbing systems. Plaintiffs have sued Defendants, alleging that Defendants violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("Civil RICO").

The case is now before the Court on Defendants' Motions to Dismiss (Instruments No. 99. No, 102, No. 103, No. 106, and No. 110), to which Plaintiffs have filed a consolidated response (Instrument No. 113).[1] The Court

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[1] In their Response, Plaintiffs state that Defendants' Motions to Dismiss should be denied because Judge Norman Black denied similar motions to dismiss in *Villager Lodge, Inc. v.*

has thoroughly reviewed the motions and accompanying briefs, Plaintiffs' response, the Second Amended Complaint, Plaintiffs' RICO Statement, and the applicable legal authorities. Based on this review, the Court grants Defendants' motions to dismiss the Civil RICO claim. Having dismissed the only federal claim and absent allegations of complete diversity of citizenship, the Court declines to exercise supplemental jurisdiction over Plaintiffs' state law claims which are dismissed without prejudice.

I. PLAINTIFFS' ALLEGATIONS

Plaintiffs allege that Defendant Shell Chemical Company organized various manufacturers of polybutylene plumbing and component parts into an enterprise which Plaintiffs refer to as the "PB Enterprise." Plaintiffs allege that the purpose of the PB Enterprise was to promote polybutylene plumbing systems, create an enormous demand for the systems, and cause polybutylene to become the material of choice for plumbing and potable water service distribution systems.

Plaintiffs allege that, in furtherance of PB Enterprise's goal to promote polybutylene plumbing systems, Defendants made material misrepresentations to building code entities, builders, and plumbers concerning the

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attributes of the systems. Plaintiffs concede that they "did not rely on anything Defendants said or published in purchasing their properties . . . ." Response, Instrument No. 113, at 24. Instead, Plaintiffs allege that they relied on the building inspectors who told them that the properties' plumbing systems satisfied local building codes.

Defendants filed motions to dismiss, arguing *inter alia* that Plaintiffs' allegations were insufficient to support the proximate causation requirement of their Civil RICO claim.

II. STANDARD FOR MOTION TO DISMISS

Rule 12(b)(6) allows for dismissal if a plaintiff fails "to state a claim upon which relief may be granted." Rule 12(b)(6) dismissal "is appropriate only if there is no set of facts that could be proven consistent with the allegations in the complaint that would entitle the plaintiff to relief." *Power Entertainment Inc. v National Football League Properties Inc.*, 151 F.3d 247, 249 (5th Cir. 1998). The factual allegations "must be reviewed in the light most favorable to the plaintiff." *Piotrowski v. City of Houston*, 51 F.3d 512, 514 (5th Cir. 1995). Unlike motions for summary judgment, the Rule 12(b)(6) motion "only tests whether the claim has been adequately stated in the complaint." *Doe v. Dallas Independent School Dist.*, 153 F.3d 211, 220 (5th Cir. 1998).

III. ANALYSIS

The Civil RICO statute requires the plaintiff to prove that he was "injured in his business or property by reason

of a violation of section 1962." 18 U.S.C. § 1964. The clear language of the statute imposes three separate requirements: (1) injury to the plaintiffs business or property; (2) proximate causation ("by reason of"); and (3) the underlying wrong (the section 1962 violation). The Fifth Circuit has held that proof of the underlying wrong, if mail or wire fraud, does not require proof of detrimental reliance. *Armco Industrial Credit Corp. v. SLT Warehouse Co.*, 782 F.2d 475, 482 (5th Cir. 1986). The Fifth Circuit has not addressed, however, the issue of reliance as an element of the proximate cause requirement.[2]

The proximate causation issue was thoroughly and persuasively addressed by the Fourth Circuit in *Brandenburg v. Seidel*, 859 F.2d 1179 (4th Cir. 1988), and by the Eleventh Circuit in *Pelletier v. Zweifel*, 921 F.2d 1465 (11th Cir.), *cert. denied*, 502 U.S. 855 (1991). In *Brandenburg*, the Fourth Circuit held that civil RICO plaintiffs who base their claim on predicate acts of mail or wire fraud must allege both that they detrimentally relied on the fraudulent statements and that the fraudulent statements were the proximate cause of the alleged injury to their property or business. *Brandenburg*, 859 F.2d at 1188-90. In *Pelletier*, the Eleventh Circuit held that "when the alleged predicate act is mail or wire fraud, the plaintiff must have been a target of the scheme to defraud and must have

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relied to his detriment on misrepresentations made in furtherance of that scheme."

Pelletier, 921 F.2d at 1499-1500. *See also Lifschultz Fast Freight, Inc. v. Consolidated Freightways Corp.*, 805 F. Supp. 1277, 1291-92 (D.S.C. 1992) (no proximate cause because the "alleged predicate acts were all directed at third parties"), *aff'd*, 998 F.2d 1009 (4th Cir.), *cert. denied*, 510 U.S. 993 (1993).

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Similarly, in this case Plaintiffs do not allege that fraudulent communications through mail and wire were directed to them and do not allege that they relied on any of the alleged misrepresentations to third parties. Instead, Plaintiffs allege that they relied on building inspectors who reported that the polybutylene plumbing systems satisfied building codes which had been established based on material misrepresentations to the building code entities.

The Court concludes, based on its review of the civil RICO statute and the cases cited herein, that absent an

allegation that Defendants made material misrepresentations to Plaintiffs and that Plaintiffs relied on the mail and wire fraud on which the Civil RICO claims are predicated, Plaintiffs cannot satisfy the proximate causation requirement for purposes of Civil RICO. As a result, Plaintiffs Civil RICO claim must be dismissed.

Under 28 U.S.C. § 1367(c)(3), the Court declines to exercise supplemental jurisdiction over Plaintiffs' pendent state law claims. These matters are more properly dealt with in the state courts. *See Parker & Parsley Petroleum Co. v. Dresser Industries*, 972 F.2d 580, 585 (5th Cir. 1992) ("Our general rule is to dismiss state claims when the federal claims to which they are pendent are dismissed.").

IV. CONCLUSION AND ORDER

Based on the foregoing, the Court concludes that Plaintiffs have failed to state a claim under the RICO statute. Accordingly, it is hereby

ORDERED that Defendants' Motions to Dismiss (Instruments No. 99, No. 102, No. 103, No. 106, and No. 110) are **GRANTED** as to Plaintiffs' Civil RICO claim, which will be DISMISSED WITH PREJUDICE by separate order.

IT IS FURTHER **ORDERED** that Plaintiffs' state law claims are DISMISSED WITHOUT PREJUDICE to being refiled in the appropriate state court. Plaintiffs should take note that the period of limitations for the dismissed state claims is tolled for an additional period of thirty (30) days after entry of the Court's Final Order of Dismissal

unless state law provides for a longer tolling period. 28 U.S.C. § 1367(d).

SIGNED this 21 day of May, 1999, at Houston, Texas.

/s/ David Hittner
DAVID HITTNER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SUMMIT PROPERTIES, INC., *et al.*,	§	
Plaintiffs,	§	CIVIL ACTION NO.
vs.	§	H-98-1954
HOECHST-CELANESE CORPORATION, et al.,	§	
Defendants.	§	

FINAL ORDER OF DISMISSAL

(Filed May 24, 1999)

In accordance with the Memorandum Opinion and Order issued this day, it is hereby

ORDERED that Defendants' Motions to Dismiss (Instruments No. 99, No. 102, No. 103, No. 106, and No. 110) are **GRANTED** as to Plaintiffs' Civil RICO claim, which is DISMISSED WITH PREJUDICE. Plaintiffs' state law claims are DISMISSED WITHOUT PREJUDICE to Plaintiffs' refiling the claims in the appropriate state court.

THIS IS A FINAL ORDER OF DISMISSAL.

SIGNED this 21 day of May, 1999, at Houston, Texas.

/s/ David Hittner
DAVID HITTNER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SUMMIT PROPERTIES, INC., ET AL.	§	**CIVIL ACTION NO. H-98-1954 JURY**
Plaintiffs,	§	
VS.	§	
HOECHST-CELANESE CORPORATION f/k/a CELANESE CORPORATION, ET AL.	§	
Defendants.	§	

PLAINTIFFS' UNOPPOSED MOTION FOR LEAVE TO AMEND COMPLAINT

(Filed Dec. 22, 1998)

To the Court:

The Summit Plaintiffs, identified on the attached Schedule I, pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, file this Motion for Leave to Amend Complaint and show as follows:

1. Plaintiffs filed their complaint on June 23, 1998. Plaintiffs moved for leave to file their First Amended Complaint on August 4, 1998 and leave was granted on August 11, 1998. Thereafter, this Court entered a scheduling order directing that all further amendments to pleadings be filed by September 15, 1999.

2. Plaintiffs move for leave to amend their complaint for a number of reasons. First, Plaintiffs desire to clean up some of the language and remove parties which

have no relation to this case. In their Complaint, Plaintiffs identified several entities involved in the manufacturing, distribution or marketing of polybutylene which were not made parties to this lawsuit by either the Plaintiffs or the Defendants as of this date. Instead of inundating the pleadings with names of entities which do not need to be identified, Plaintiffs have dropped several of the named entities and substituted the word "others" when necessary to show the extent of the conspiracy.

3. Second, Plaintiffs needed to amend the sections claiming fraud and fraudulent concealment to show that Plaintiffs were the direct victims of Defendants' fraud and RICO violations. Instead of purchasing completed properties which were operational at the time of the sale, as is the case for most of the *Villager* plaintiffs, the Summit Plaintiffs developed the properties and continued to own and operate them from the date that Plaintiffs built them. As identified in the Second Amended Complaint, Plaintiffs made the decisions to incorporate polybutylene plumbing systems into their projects on the basis of direct representations, which, unknown to Plaintiffs, were false.

4. Third, Plaintiffs also filed a Statement of Facts Supporting Their RICO Claims, (the "RICO Statement"). Plaintiffs do not intend, unless the Court so orders, to amend their RICO Statement. In fact, it is not required that Plaintiffs file such a RICO Statement as was previously required. The RICO Statement still accurately describes the factual basis for the Defendants' liability and it is incorporated by reference into the Second Amended Complaint. The only change would be to state more explicitly, if that is necessary, that Household International, Inc. is charged as a principal under § 1962(c).

Plaintiffs believe that they adequately charged Household as a principal in the RICO Statement, however, this change makes it clear and unequivocal. Thus, it should be unnecessary to republish the lengthy RICO Statement only to make this one new assertion.

5. Leave to amend should be freely given when justice so requires. Fed. R. Civ. P. 15. Justice requires this amendment because the Second Amended Complaint, attached hereto as Exhibit "B", more accurately represents the facts that will be proved on trial.

Thus, Plaintiffs pray that this Court grant its Motion for Leave to File Amended Complaint, that the Court deem such Second Amended Complaint filed as of the date of the Court's order, and for such other and further relief to which Plaintiffs are duly and justly entitled.

Respectfully submitted,

/s/ Barry L. Racusin/by [Illegible]
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CERTIFICATE OF CONFERENCE

On December 17, 1998, I sent this Motion via facsimile, attached hereto as Exhibit "A", to all counsel of record asking them to fax or phone me by Monday, December 21, 1998, if any person had an objection to this Motion. No party contacted me about this Motion and is thus unopposed.

/s/ David D. Ritter
David D. Ritter

CERTIFICATE OF SERVICE

This instrument has been served by certified mail, return receipt requested, on all persons on the service list on this the 22nd day of December 1998.

/s/ David D. Ritter
DAVID D. RITTER

SERVICE LIST

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Vanguard Plastics, Inc.
CMRRR: 916731

SCHEDULE I

1. Summit Properties, Inc.
2. Summit Properties, L.P.
3. Summit Properties Partnership, L.P.
4. Stony Point/Summit, L.P.
5. McGregor/McGuire, L.P.
6. Henderson/McGuire Partners, L.P.
7. Oak Ridge/McGuire Partner, L.P.
8. Waverly Place Summit Partners, L.P.

EXHIBIT

"A"

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December 17, 1998

TIME: 3:15 p.m.

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OUR FILE/REFERENCE: Summit Properties

TOTAL NUMBER OF PAGES TRANSMITTED (INCLUDING THIS PAGE): 4

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FAX MACHINE MODEL: LANIER 4500

If you have any problems with the transmission or receipt of this facsimile, please contact *Nancy* at (713) 626-1450 immediately. Thank you.

COMMENTS: **Enclosed is Plaintiffs' Motion for Leave to Amend Complaint. We would like this motion to be filed unopposed. If any of you are opposed, please let us know by facsimile or telephone by Monday, December 21. We intend to file this Motion on Tuesday. Thanks. David**

*** BROADCAST REPORT ***

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PAGE 1

No.	START TIME	MODE	LOCATION	STORE PAGE	TX PAGE	TOTAL TIME	CODE
1	12/17 16:01	TX	2220843	4	4	01'40"	OK
2	12/17 16:03	TX	7570178	4	4	01'10"	OK
3	12/17 16:04	TX	6279395	4	4	01'10"	OK
4	12/17 16:06	TX	6155265	4	4	01'42"	OK
5	12/17 16:08	TX	6557727	4	4	01'12"	OK
6	12/17 16:10	TX	9932308	4	4	01'28"	OK

EXHIBIT

"B"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SUMMIT PROPERTIES, INC., SUMMIT PROPERTIES, L.P., SUMMIT PROPERTIES PARTNERSHIP, L.P., STONY POINT/SUMMIT, L.P., MCGREGOR/MCGUIRE, L.P., HENDERSON/MCGUIRE PARTNERS, L.P., OAK RIDGE/MCGUIRE PARTNERS, L.P., AND WAVERLY PLACE/SUMMIT PARTNERS, L.P.,	§	CIVIL ACTION NO. H-98-1954 JURY
Plaintiffs,	§	
VS.	§	
HOECHST-CELANESE CORPORATION f/k/a CELANESE CORPORATION, HOECHST CORPORATION, E.I. DuPONT DE NEMOURS & CO., SHELL OIL COMPANY d/b/a SHELL CHEMICAL COMPANY, VANGUARD PLASTICS, INC., BOW INDUSTRIAL CORPORATION and HOUSEHOLD INTERNATIONAL, INC.	§	
Defendants.	§	

PLAINTIFFS' SECOND AMENDED COMPLAINT

To the Court:

Plaintiffs, SUMMIT PROPERTIES, INC., SUMMIT PROPERTIES, L.P., SUMMIT PROPERTIES PARTNERSHIP, L.P., STONY POINT/SUMMIT, L.P., MCGREGOR/MCGUIRE, L.P., HENDERSON/MCGUIRE PARTNERS, L.P., OAK RIDGE/MCGUIRE PARTNERS, L.P., AND WAVERLY PLACE/SUMMIT PARTNERS, L.P., bring this Second Amended Complaint complaining of and against HOECHST/CELANESE CORPORATION f/k/a CELANESE CORPORATION, ("CELANESE"), HOECHST CORPORATION, ("HOECHST"), E.I. DuPONT DE NEMOURS & CO., ("DuPONT"), SHELL OIL COMPANY d/b/a SHELL CHEMICAL COMPANY, ("SHELL"), VANGUARD PLASTICS, INC., a Kansas Corporation, ("VANGUARD"), BOW INDUSTRIAL CORPORATION, ("BOW"), and HOUSEHOLD INTERNATIONAL, INC., ("HOUSEHOLD"), (collectively "Defendants"), and shows as follows:

I.

Plaintiffs

1 Plaintiff SUMMIT PROPERTIES PARTNERSHIP, L.P., a Delaware Limited Partnership, ("Summit"), is the owner and/or operator of several residential apartments, institutional residences or other multi-unit dwellings, throughout the country. The properties owned by Summit are Summit Beacon Ridge, Summit Blue Ash, Summit Breckenridge, Summit Charleston, Summit Fairview, Summit Glen, Summit Heron's Run, Summit Highland, Summit McIntosh, Summit Meadow, Summit Norcraft,

Summit Palm Lake, Summit Park, Summit Perico, Summit Square, Summit Village, Summit Walk, Summit Waterford, and Summit Windsor. Such properties are damaged as a result of the actions and products of Defendants.

2 Plaintiff STONY POINT/SUMMIT LIMITED PARTNERSHIP, a Virginia Limited Partnership, ("Stony Point"), is the owner and/or operator of a residential apartment, institutional residence or other multi-unit dwelling, known as Summit Stony Point, which is damaged as a result of the actions and products of Defendants.

3 Plaintiff McGREGOR/McGUIRE LIMITED PARTNERSHIP, a Florida Limited Partnership, ("McGregor"), is the owner and/or operator of a residential apartment known as Summit Gateway, which is damaged as a result of the actions and products of Defendants.

4 Plaintiff HENDERSON/McGUIRE PARTNERS, LIMITED PARTNERSHIP, a Delaware Limited Partnership, ("Henderson"), is the owner and/or operator of a residential apartment, institutional residence or other multi-unit dwelling, known as Summit Pike Creek, which is damaged as a result of the actions and products of Defendants.

5 Plaintiff OAK RIDGE/McGUIRE PARTNERS, LIMITED PARTNERSHIP, a North Carolina Limited Partnership, ("Oak Ridge"), is the owner and/or operator of a residential apartment, institutional residence or other multi-unit dwelling, known as Oak Ridge at Pelham Apartments, which is damaged as a result of the actions and products of Defendants.

6 Plaintiff WAVERLY PLACE SUMMIT PARTNERS, LIMITED PARTNERSHIP, a North Carolina Limited Partnership, ("Waverly"), is the owner and/or operator of a residential apartment, institutional residence or other multi-unit dwelling, known as Waverly Place, which is damaged as a result of the actions and products of Defendants.

II.

Defendant Parties

7 CELANESE is a Delaware corporation authorized to do and is doing business in Texas. CELANESE manufactured and sold raw materials, known as "Celcon", from which plastic acetal insert fittings were manufactured and used in polybutylene ("PB") plastics plumbing systems. The exercise of jurisdiction by Texas courts over CELANESE, by reason of the extent to which CELANESE is, and was at all times material hereto, doing business in Texas, as well as by recent and sufficient contacts with Texas, would not offend traditional notions of fair play and substantial justice. CELANESE has been served and has appeared in this action.

8 HOECHST is a Delaware Corporation, authorized to do and doing business in Texas. HOECHST is the parent company of CELANESE. The exercise of jurisdiction by Texas courts over HOECHST, by reason of the extent to which HOECHST is, and was at all times material hereto, doing business in Texas, as well as by recent and sufficient contacts with Texas, would not offend traditional notions of fair play and substantial justice.

HOECHST has been served and has appeared in this action.

9 DuPONT is a Delaware corporation authorized to do and doing business in Texas. DuPONT manufactured and sold raw materials, known as "Delrin," from which plastic acetal insert fittings were manufactured and used in PB plastic plumbing systems. The exercise of jurisdiction by Texas courts over DuPONT, by reason of the extent to which DuPONT is, and was at all times material hereto, doing business in Texas, as well as by recent and sufficient contacts with Texas, would not offend tradition [sic] notions of fair play and substantial justice, DuPONT has been served and has appeared in this action.

10 SHELL[1] is a Delaware Corporation with its headquarters and principal place of business in Houston, Texas, SHELL manufactures and sells the raw materials used to make PB plastic pipes for PB plumbing systems, SHELL had a monopoly on the sale of such raw materials in the United States and was the driving force behind the nationwide promotion and marketing of PB plastic plumbing systems. The exercise of jurisdiction by Texas courts over SHELL, by reason of the extent to which SHELL is, and was at all times material hereto, doing business in Texas, as well as by recent and sufficient contacts with Texas, would not offend traditional notions of fair play and substantial justice. SHELL has been served and has appeared in this action.

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[1] Shell Chemical Company is a division of Shell Oil Company.

11 VANGUARD is a Kansas corporation not authorized to do business in Texas but nonetheless doing business in Texas and failing to maintain a registered agent in Texas for service. VANGUARD manufactures and sells PB plumbing systems throughout the United States and actively participated with SHELL, U.S. Brass Corporation, and others in the nationwide promotion and marketing of PB plastic plumbing systems. The exercise of jurisdiction by Texas courts over VANGUARD, by reason of the extent to which Vanguard is, and was at all times material hereto, doing business in Texas, as well as by recent and sufficient contacts with Texas, would not offend traditional notions of fair play and substantial justice. VANGUARD has been served and has appeared in this action.

12 BOW is a foreign corporation authorized to do and doing business in Texas. BOW was involved in the Houston-based polybutylene plumbing system conspiracy. As a co-conspirator, BOW is responsible and liable for the acts of its co-conspirators which occurred in Texas and which BOW knew or should have known would occur in Texas. BOW sold its product nation-wide and its product has become a permanent fixture upon Texas soil. The exercise of jurisdiction by Texas courts over BOW, by reason of the extent to which BOW is, and was at all times material hereto, doing business in Texas, as well as by recent and sufficient contracts with Texas, would not offend traditional notions of fair play and substantial justice. BOW has been served and has appeared in this action.

13 HOUSEHOLD is a Delaware corporation authorized to do and doing business in Texas. The exercise of

jurisdiction by Texas courts over HOUSEHOLD, by reason of the extent to which HOUSEHOLD is, and was at all times material hereto, doing business in Texas, as well as by recent and sufficient contacts with Texas, would not offend traditional notions of fair pay [sic] and substantial justice. HOUSEHOLD has been served and has appeared in this action. HOUSEHOLD's [sic] wholly owned a subsidiary corporation named Household Manufacturing, Inc., ("Household Manufacturing"), which wholly owned a subsidiary named U.S. Brass Corporation, ("Brass"). HOUSEHOLD spun off Household Manufacturing in 1989, which became Eljer Manufacturing, Inc., ("Eljer Manufacturing"), and became the wholly-owned subsidiary of another HOUSEHOLD spin-off corporation, Eljer Industries, Inc, ("Eljer"). In 1994, Brass filed for Chapter 11 bankruptcy protection. The injunction issued in the case protected Brass, Eljer Manufacturing and Eljer from claims based upon polybutylene plumbing systems.

III.

Jurisdiction

14 Jurisdiction is based upon 28 U.S.C. § 1331 in that this action arises under Civil RICO, or 18 U.S.C. § 1961 *et seq.*

IV.

Venue

15 Venue is proper in Houston, Texas, pursuant to 28 U.S.C. § 1404 because at least one Defendant is located in Houston, Texas and a substantial part of the causes of action accrued in Houston, Texas.

16 Venue is also proper under 18 U.S.C. § 1965(a) and (b) as to all Defendants.

V.

Statement of Facts

17 In this Complaint, whenever it is alleged that any of the Defendants did any act or thing, it is meant that such Defendants' officers, agents, servants, employees, attorneys or representatives did such act or thing and that, at the time such act or thing was done, it was done with the full expressed, implied, or apparent authorization or ratification of the Defendants or was done in the normal and routine course and scope of employment of the Defendants' officers, agents, servants, employees, attorneys or representatives.

18 Plaintiffs seek to recover damages caused by the faulty and defective PB plumbing systems and components installed on their property. Plaintiffs are property owners, associations, businesses, and/or partnerships who have suffered substantial damages as a result of the defective plumbing systems and their components.

A. The Polybutylene Plastic Plumbing System.

19 A hot and cold potable water plumbing system is one of the major systems installed in residential or commercial buildings. Beginning in the late 1970's, SHELL orchestrated and directed a massive effort to convince the plumbing and construction industry that PB plumbing

systems were suitable for use in residential and commercial buildings, and potable water service distribution systems were both superior to and less expensive than copper systems, which dominated the market and other alternatives.

20. The PB plumbing systems consist of pieces of plastic pipe, made from PB, which are joined together by fittings. The vast majority of the fittings are acetal plastic ("fittings"). Pursuant to the instructions or endorsements of the Defendants, the ends of the fittings are inserted into the pipe, crimp rings made of copper or aluminum are squeezed over the points of joint or between the fittings and the pipes, and the crimp rings are fixed into place over the union of pipe and fitting with a crimping tool. Defendants initiated, ratified and/or approved this method of connection and installation.

21 SHELL makes PB resins from which the PB pipes are manufactured. At all material times, SHELL has a total monopoly on the PB marked [sic] in the United States, PB plumbing systems cannot be made or marketed without the PB resin from SHELL. SHELL had total control over the PB market.

22 Polybutylene is a by-product of the oil refining process. By developing a profitable use for PB, oil companies, such as SHELL, would be able to sell excess by-product. SHELL purchased the PB business in the 1970's along with an exclusive 10-year right to sell the product in the U.S. SHELL sold PB resin pellets to pipe extruders including, VANGUARD, BOW, Brass and others who manufactured PB tubing from the pellets.

23 Some of the acetal for the PB plumbing systems were made from resin made and sold by CELANESE, and known as Celcon. The rest of the acetal plastic fittings were made from resin manufactured and sold by DuPONT under the name Delrin. CELANESE and DuPONT designed, engineered, produced, manufactured, marketed and promoted the acetal copolymer resin under the Trademark "Celcon" and "Delrin", respectively, particularly for use in the manufacture of fittings for PB plumbing systems.

24 CELANESE and DuPONT sold the competing acetal resins as a raw material for the fabrication of acetal fittings for plumbing systems, CELANESE selling its acetal resins to VANGUARD, Brass and others and DuPONT selling its acetal resin to VANGUARD and other. Acetal resins were molded into acetal insert fittings, valve stops, plugs, and other accessories to compliment the PB pipe and complete the plumbing system.

25 BOW, VANGUARD, Brass and others all manufactured and/or sold PB plumbing systems or component parts thereof.

26 Plast-a-Matic Corporation, ("Plast-a-Matic"), purchased Celcon resin from CELANESE and designed, engineered, produced and manufactured insert acetal fittings, including tees, elbows and couplings from the Celcon resin. Plast-a-Matic promoted and marketed its insert acetal fitting marked with "A/I" to Admiral Marine Products Company, ("Admiral"), VANGUARD and others. Likewise, Plast-a-Matic purchased PB from SHELL and designed, engineered, produced and manufactured PB pipe.

27 Admiral purchased insert acetal fittings, engineered and manufactured with the Celcon resin, from Plast-a-Matic and promoted, sold and marketed insert acetal fittings marked with "A/I" to VANGUARD and others.

28 Admiral and Plast-a-Matic operated as contract fitting manufacturers for VANGUARD and others, marketing Celcon insert fittings that were sold as components of the customer's PB plumbing systems. In addition, during the 1980's, VANGUARD began making its own Delrin fittings and began buying Celcon resin.

29 VANGUARD purchased Celcon resin from CELANESE and designed, engineered, produced and manufactured insert acetal fittings, including tees, elbows, couplings, et al., using Celcon resin. In addition, VANGUARD purchased and marketed insert acetal plumbing fittings from Admiral and Plast-a-Matic. VANGUARD promoted and marketed these insert acetal fittings under the trademarked "Safeguard" or "SG" to builders, developers, plumbing distributors and other buyers and users of plumbing parts. Likewise, VANGUARD purchased PB from SHELL and designed, engineered, produced and manufactured PB ipe.

30 VANGUARD manufactured PB pipe from resin supplied by SHELL and molded acetal fittings from the resin supplied by CELANESE and DuPONT. Under a marketing plan devised by SHELL in the late 1970's, SHELL, VANGUARD and others promoted and sold the complete PB plumbing systems. VANGUARD promoted and sold its product under the name Safeguard.

31 VANGUARD, BOW, Brass and others extruded the PB tubing from SHELL resins. VANGUARD, BOW, Brass and others developed PB systems composed of pipe made from PB and insert fittings made from Celcon or Delrin, fastened to the pipe by means of a metal crimp ring that is applied with a special crimp tool. The tubing was sold alone or as a component of complete PB plumbing systems. VANGUARD, Brass and others also manufactured acetal fittings and parts for their PB systems.

32 SHELL, CELANESE, DuPONT, VANGUARD, BOW, Brass, Admiral and Plast-a-Matic, among others, marketed PB pipe and systems including insert acetal fittings across the country to builders, developers, plumbing distributors and other buyers and users of plumbing parts. They made the representations which SHELL made in its marketing efforts and assisted SHELL in its marketing efforts. Among other things, they represented that a PB plumbing system would last the normal lifetime of a home or building in which it was installed; that the PB plumbing system could be correctly installed easily and inexpensively; that the plumbing system would not degrade or corrode; and that it had characteristics and benefits well in excess of any other plumbing system sold in America. All such representations were false.

33 Defendants conspired together to profit from the polybutylene plumbing systems. They contributed resources and money to associations created for the furtherance of the conspiracy. The conspiracy was based in Houston, Texas, where SHELL organized and implemented the plan of the conspiracy. The conspiracy produced a fraud on the market and upon the public.

34 Plaintiffs' commercial properties contained PB pipe and insert acetal fittings promoted, designed, engineered, produced, manufactured and sold by the Defendants. Plaintiffs have learned that the PB plumbing system failed or is failing. The systems and their components are degrading, cracking, leaking and spraying water, causing substantial damages to Plaintiffs and their properties. Some Plaintiffs have been forced to replace many of the insert acetal fittings and PB pipe and believe and anticipate that the need to replace any insert acetal fittings and pipe will be necessary in the future until the entire system is replaced. Plaintiffs have been forced to take the additional repair of the plumbing system, and cosmetic repair, if feasible, including but not limited to the repair and replacement of fittings, pipe and other components, sheetrock, exterior brick, wood, flooring, carpet and painting. Other items of personalty and/or business property have been damaged or destroyed. Plaintiffs' businesses have been damaged due to the property damage caused by the failing systems and its effect on Plaintiff's ability to run their businesses.

B. The Fraudulent Marketing of the Polybutylene System

35 SHELL established its monopoly position in the manufacture and sale of PB resin in the United States in 1977. SHELL achieved this monopoly position by buying the existing PB business of Witco Chemical and the patents for PB resin, and by obtaining exclusive right for ten

years to market PB resin in the United States. This position enabled the conspiracy to defraud the plumbing market.

36 SHELL's objective and its co-conspirators' joint enterprise was to create an enormous demand for PB pipe by causing it to become the material of choice instead of copper for residential and commercial plumbing and potable water service distributions systems and to achieve dominant position in that market before its ten year exclusive marketing right expired and competition could develop. From the beginning, SHELL's actions were driven by (1) its objective to become a dominant supplier of raw material for plumbing systems in the United States and ultimately worldwide, and (2) its monopoly to establish its market position in a short period of time in order to take advantage of the window of opportunity created by its ten year monopoly position.

37 SHELL, therefore, created the conspiracy by organizing and directing a massive marketing plan designed to accomplish its objectives. SHELL developed the advertising materials using the resources available within SHELL and hired outside advertising consultants. SHELL also concluded that the manufacturers' representatives would be critical in the marketing effort, and so SHELL enlisted the Defendants and others to participate in the joint marketing effort. SHELL developed advertisement brochures, manuals and guides for PB plumbing systems and provided them to the Defendants and others for dissemination through the United Stats. The representations contained in those marketing material [sic] originated with SHELL, DuPONT and CELANESE and were

spread through the construction and plumbing industries, in an effort to convince builders and plumbers to use PB plastic plumbing systems, and to convince building officials and code bodies to approve the use of such systems.

38 Plumbing materials may not be used in a particular geographic area unless they are approved and listed by the building code bodies having jurisdiction over that area. Therefore, SHELL and the Defendants had to gain and maintain the necessary building code body approvals for the PB plumbing system. SHELL and the Defendants believed that the building code bodies were the major impediment to their objective of displacing copper and becoming the dominant raw material supplier to the plumbing systems market in the United States. Promotion of the PB system to the building code bodies around the country was therefore a major focus of the marketing effort orchestrated by SHELL, and implemented jointly by the Defendants and others.

39 SHELL officials drafted proposals to include PB systems in building codes, prepared and presented to code bodies materials extolling the purported virtues of PB systems, and provided such materials to others, including the Defendants, for them to present to the code bodies. The same representations as to the characteristics of PB plumbing systems were made to the code bodies in order to gain their approval as were made to the construction and plumbing industries in the marketing of the systems once the approvals were gained.

40 SHELL's marketing effort was well organized and extensive. In addition to saturation of the industry with material relating to PB systems and the focus on the

code bodies, the official marketing plan included extensive use of the media, the use of SHELL sales personnel in sales blitzes in major metropolitan areas, and the publication by SHELL (with the support and cooperation of the Defendants) of a magazine (Polybutylene Piper) dedicated solely to the promotion of PB.

41 SHELL also caused the formation of an industry trade group, the Polybutylene Committee of the Plastic Pipe and Fittings Association (PPFA), the purposes of which was to promote and protect the interests of producers of PB products. SHELL and the other Defendants were members of the PPFA Polybutylene Committee, and through that vehicle as well as others, they met on a regular basis, exchanged information, contributed funds, and jointly promoted PB plumbing systems.

42 The basic marketing pitch developed by SHELL and repeated through the country by SHELL, the Defendants and others was that the PB plastic plumbing system had characteristics that made it superior to copper systems and other alternatives. Among other things, Defendants represented:

a. The system is suitable for use as a hot and cold potable water plumbing system;

b. The system will last at least 50 years;

c. The system will not corrode and even the most aggressive water will not attack it;

d. The joining systems are easy, reliable, simple, proven and fast;

e. Service problems with the system have been virtually nil.

43 All of these representations were false. Defendants knew, or should have known, that the PB system suffered from inherent defects that rendered it wholly unsuitable for use as a hot and cold water plumbing system or in potable water service distribution systems. Far from being suitable for potable water plumbing systems and immune from corrosion and attack by water, PB systems in fact are attacked by chlorine, a substance routinely present in potable water supplies in the United States. PB plumbing systems degrade in chlorinated water, become brittle and fail prematurely. Hot water at temperatures common in residential and commercial water supplies and stress at levels common to the PB plumbing systems and in potable water service distribution systems compound the problem, and cause an acceleration of the degradation that leads to failure.

44 In addition, the representation that "joining methods are easy, simple and reliable" was false. The Defendants promoted and ratified the "crimp ring" method of connecting the pipe to the fittings. The Defendants advertised a method where in order to avoid over crimping or under crimping a joint, the crimp ring must be compressed within extremely minute tolerances which the Defendants knew were unrealistic and were not being achieved by the crimping tools distributed by Defendants. Furthermore, the Defendants' instructions to plumbers failed to disclose the minute tolerances within which the joints had to be crimped and created the false impression that the system was fast and easy to install and could be installed with little, if any, special training.

45 The representation that the system would last 50 years was also false. Defendants knew, or should have

known, that the claim was false and that there was no reasonable basis for such a claim.

46 The representation that service problems with the system were virtually nil was also false. In fact, there were extensive failures, a fact which Defendants knew or should have known.

47 Defendants were fully aware of the inherent defects in the PB plumbing system, and intentionally did not disclose that information to the industry, consumers, or code approval officials. Instead, they agreed among themselves not to disclose such information, and took affirmative step to prevent their knowledge of the defects in the system from becoming public. Defendants kept the potential and actual problems with the system secret because they knew that if this information became public it would prevent the penetration of PB plumbing systems into the marketplace, and would preclude the eventual dominance of that market which they sought.

48 Internal tests and studies as well as field failures alerted Defendants to the inherent defects of the system from the beginning. Nonetheless, they continued to promote and sell the systems, representing them to be suitable for residential and commercial plumbing and in potable water service distribution systems, and concealing the problems their own internal tests and studies had alerted them to, including the failure of the PB system to perform its stated function.

49 Time and time again, Defendants discussed the problem internally and among themselves. Suggestions that were made to advise the public of tests that had been conducted and showed the potential problems were

rejected, and the test data was instead kept secret. Defendants knew that knowledge of the chlorine effect and the other inherent defects with the system and its components would be a cause for concern by code bodies and governmental agencies, and so they intentionally concealed such information from the code bodies as well as potential customers.

50 The processes by which the failures occur are not immediate. They occur over a period of time, (a few months to a few years), as the various forces which inevitably cause the failures progressively cause the pipe and fittings to degrade and the system to fail mechanically. It was not long, however, before system failures began occurring as a result of the very problems Defendants had anticipated.

51 Defendants undertook to cover up the real reasons for these failures, blaming the failures on plumbers for alleged installation errors or users for allegedly improper uses. While CELANESE and SHELL held a secret meeting in Houston to discuss what they referred to as extensive field failures, Defendants simultaneously told code bodies that the problems were very limited. While Brass, CELANESE and SHELL discussed among themselves secretly that they had done nothing to attempt to determine whether improper installation was the primary cause of failures, Defendants simultaneously represented to code bodies that the failures that had occurred were due to improper installation. While publicly blaming plumbers for fault installation, Defendants concealed the information they had which showed the plumbers were not responsible.

52 Despite knowledge of the defects and extensive failures, Defendants continued to represent the system and its component parts as well proven, reliable, easy to install, and suitable for potable hot and cold water systems and in potable water services distribution systems. These representations were false.

53 As set forth above, the weakest link in the system was the means by which the tubing was joined. Ultimately, the failure rate of the system at the plastic insert fittings became so great that the use of the acetal plastic insert fittings for site built construction was allegedly discontinued in late 1986 or early 1987, although many of Plaintiffs' properties were built after 1987. Even then, while SHELL's internal study concluded that acetal plastic insert fittings contained inherent problems, Defendants' public posture was that there were not problems with acetal plastic insert fittings and the change to metal insert fittings was simply to upgrade the system.

54 SHELL and VANGUARD continue, or until just recently continued, to market PB plumbing systems despite the massive failures and the knowledge that such systems are unsuitable as a hot and cold potable water plumbing system in potable water service distribution systems. These Defendants know that the plastic insert fitting is not the only problem with the systems, but instead is just the weakest link and, therefore, is the point of first failure. They know that the same defect exists in the pipe, it simply takes longer for the pipe to degrade and fail than it does for the plastic fittings. In fact, pipe failures are occurring in growing numbers. Defendants

further know of mechanical defects inherent in the joining systems that utilize metal insert fittings that render these systems defective and unsuitable.

55 The PB systems joint assembly fails due to several mechanical factors, including stress relaxation, differing co-efficients of thermal expansion, and failure to manufacture the components within the specifications that the system requires, among other things.

56 SHELL's Polybutylene Department and the SHELL executives who devised and implemented the nationwide marketing scheme for PB plumbing systems and who made SHELL's decision regarding PB are at all times have been located in Houston, Harris County, Texas.

57 As a result of Defendants' conduct set forth above, Plaintiffs own PB plumbing systems which are inherently defective and have already prematurely failed or will do so.

58 Defendants knew that chlorinated water and other chemicals in regular drinking water caused acetal fittings to crack and degrade. Defendants were well aware of the acetal-chlorine problem with fittings made from Celcon or Delrin. In addition, CELANESE and DuPONT knew that Celcon and Delrin should not be used in an environment where it would be exposed to chlorine in any amount due to the negative impact of chlorine on the material, and that hot water applications were particularly dangerous due to the catalytic effects of high temperatures. CELANESE and DuPONT represented to the public that their respective acetal resins were (1) suitable for use in water systems. (2) reliable and would

have a long life when used in plumbing systems, and (3) a fit and proper material for use as plumbing insert fittings. CELANESE and DuPONT failed to disclose to the public that Celcon and Delrin would degrade or corrode and ultimately fail when exposed to the chemicals it knew existed in ordinary drinking water. Even after receiving reports of fitting failures, CELANESE and DuPONT continued to represent that Celcon and Delrin material were suitable for their intended use in plumbing systems. The other Defendants also had this knowledge and made these claims and representations while marketing the PB plumbing systems. Notwithstanding the abundance of information to the contrary, CELANESE and DuPONT and other defendants, marketed Celcon and Delrin as an ideal plumbing-grade material.

59 SHELL and the other Defendants knew that the PB tubing would fail due to notch sensitivity, chlorine degradation, or oxidation. SHELL and the other Defendants refused to deal with these problems as a means of preventing public disclosure of the problem. Instead, they conspired with each other to conceal these facts from the code bodies, builders, and plumbers so that Defendants could capture and dominate the plumbing market in the United States.

60 Plaintiffs own and operate residential apartment buildings and other multi-unit commercial dwellings throughout the country. To secure new tenants and maintain the loyalty of existing tenants, Plaintiffs provide, or at least attempt to provide, clean, comfortable, safe and attractive living units. As business owners, Plaintiffs rely heavily upon the quality apartments, institutional residences and other multi-unit dwellings they operate and

the good reputation they have worked hard to establish. The Defendants have severly damaged Plaintiffs' businesses, by providing faulty PB plumbing systems. Plaintiffs' buildings quality and reputations have been severely damaged by the faulty PB plumbing systems incorporated in their apartments, institutional residences and other multi-unit dwellings. All Plaintiffs have suffered damages as a result of the Defendants' conduct and seek to recover their damages from Defendants.

VI.

Negligence

61 Defendants violated their duty to exercise the ordinary care and diligence exercised by a reasonable and prudent designer, manufacturer and seller under the same or similar circumstances, and were negligent in the following particulars: (a) recommending or specifying Celcon, Delrin or PB for use in plumbing systems of the type installed in Plaintiffs' buildings; (b) failing to give warning or adequate warnings regarding the limitations of use of PB, Celcon, or Delrin in plumbing systems; (c) failing to adequately inspect or test the PB plumbing system, the PB tubing, the acetal fittings or the components and materials thereof; (d) failing to give warnings or adequate warnings regarding the limitation of use of the PB plumbing system, the PB tubing, the acetal fittings or component parts and materials thereof; and (e) representing that the PB plumbing systems, PB tubing, acetal fittings or their component parts and material would be suitable for use in building such as those owned and franchised by Plaintiffs. Each of the acts and omissions

alleged herein, taken separately and collectively, constitutes a direct and proximate cause of Plaintiffs' damages.

62 Defendants made statements which they knew, or should have known, were false and untrue through exercise of due care and diligence. Further, Defendants were negligent because they (1) failed to ascertain the truth of [sic] falsity of their statements concerning the quality, uses, characteristics, and benefits of the PB plumbing systems, PB Delrin or Celcon, or (2) made statements recklessly, without any knowledge of the truth, as positive assertions of fact. Defendants knew or should have known that their statements were false, incorrect or misleading. Defendants' conduct is a proximate cause of Plaintiffs' damages.

VII.

Gross Negligence

63 Plaintiffs would further show that the conduct of the Defendants constitutes "gross negligence," as that term is understood in law. Defendants knew that the PB plumbing systems, PB, Delrin or Celcon would be installed and were promoted as suitable to be installed in buildings of the type owned and franchised by Plaintiffs. Defendants, knew or should have known, that the use of these systems, component products or chemicals would result in serious damage. Nevertheless, Defendants willfully failed to take steps to avoid the probability of injury or damage. Defendants acted in conscious disregard of the rights of Plaintiffs and other consumers and knew, or

should have known, of the probable serious consequences of their conduct. Defendants were grossly negligent, reckless, and consciously indifferent. Defendants' reckless and conscious indifference to the rights of the Plaintiffs entitles Plaintiffs to exemplary and punitive damages. Plaintiffs therefore sue for exemplary and punitive damages as provided by law.

VIII.

Strict Liability

64 Defendants designed, manufactures, assembled, promoted, marketed, sold, or otherwise introduced PB plumbing systems, PB tubing, acetal fittings, PB, Celcon or Delrin into the stream of commerce. At all relevant times, Defendants were in the business of designing, assembling, manufacturing, testing, inspecting, marketing or selling PB plumbing systems, PB tubing, acetal fittings, PB, Celcon or Delrin. The PB plumbing systems, PB tubing, acetal fittings, PB, Celcon or Delrin were defective when they left each Defendant's possession, and continue to be defective in those buildings where the plumbing system and other defective components has not yet been replaced. The Defendants knew, or should have known, that the PB plumbing systems, PB tubing, acetal fittings, PB, Celcon or Delrin were defective and would fail prematurely. The PB plumbing systems and their component parts and materials reached the ultimate users, including Plaintiffs herein, in substantially the same condition in which the Defendants sold them or in which they were expected to reach the ultimate user.

65 By introducing the PB plumbing systems and their component parts and materials into the stream of commerce, the Defendants represented that these goods were safe and suitable for their foreseeable uses. Plaintiffs utilized PB plumbing systems and their component parts and materials in a foreseeable manner and relied upon Defendants' skill and judgment to Plaintiffs' damage.

66 The PB plumbing systems and their component parts and materials were defective, unreasonably dangerous, and not suitable nor reasonably fit for their foreseeable use because the plumbing systems leak, disintegrate and fail due to (I) improper material selection for the pipe, (ii) improper material selection for the known design configuration of the fittings, (iii) improper material for the known application, (iv) improper design of the fittings and pipe, and (v) inadequate instructions or warnings on the limitations of use and performance when the PB plumbing system and its component parts and materials are used in a water system.

67 The PB plumbing system and its component parts and materials were inherently defective and were certain to cause Plaintiffs' damages despite Plaintiffs' reasonably foreseeable use or other uses contemplated by Defendants. The PB plumbing systems and their component parts and materials were a producing cause of Plaintiffs' damages. As a direct and proximate result of the Defendants' conduct. Plaintiffs and other consumers have suffered and will continue to suffer serious damage. Therefore, Defendants are liable under the doctrine of strict liability.

68 Defendants were at all material times herein engaged in the business of selling PB plumbing systems or their component parts or materials, and advertised or promoted the systems or their component parts and materials by making misrepresentations of material fact concerning their character and quality, such misrepresentations being a proximate cause of Plaintiffs' damages. Therefore, Defendants are liable under the doctrine of strict liability.

69 Defendants knew that the PB plumbing systems and their component parts and materials would be installed and were promoted as suitable to be installed in building such as those owned and franchised by Plaintiffs. Defendants knew, or should have known, that the use of such systems, parts or materials would result in serious damage, but willfully failed to take steps to avoid the probability of serious damage. Defendants acted in conscious disregard of the rights of Plaintiffs and other consumers. Defendants knew, or should have know [sic], of the probable serious consequences of its conduct. Accordingly, Plaintiffs are entitled to, and hereby seek, punitive damages against defendants.

IX.

Fraud

70 Defendants made direct material representations to Plaintiffs on which Plaintiffs reasonably relied to their detriment. Some of the representations made concerned the quality of polybutylene and the PB plumbing systems. Many of the representations were made by representatives or agents of the Defendants. The Summit

Plaintiffs, when constructing their projects, authorized the development managers of each of the projects to make construction decisions, including decisions about the plumbing, in conjunction with the general contractor for each of the projects. Representatives of the Defendants provided the development managers and general contractors of each of the projects with information and representations concerning the quality, durability and resilience of polybutylene plumbing systems. Such representaions [sic] were false. Some of the representations are also found in a document entitled "PB Industry Responds to 60 Minutes," drafted in 1991 by the Defendants and others in the PB industry and received by Plaintiffs. In the document, the Defendants made reference to "Misinformation from CBS," "The Story CBS Missed," and letters from various companies to Mr. Ed Bradley and CBS complaining that the 60 Minutes program was one-sided and biased against the Defendants. Importantly, Defendants emphasized that CBS only told the story of the past problems in the 1980's, and that such problems had since been solved to the complaining parties satisfaction. The Defendants emphasized that the past problems were solved and that the PB plumbing systems currently on the market did not have the problems that the 60 Minutes program addressed. Defendants representations in this regard were false. Plaintiffs relied upon these representations, and upon other representations made by the sales representatives of Defendants in deciding to install polybutylene in their projects. In addition, Plaintiffs also relied upon representations made to continue the use of polybutylene plumbing systems in their buildings.

Plaintiffs were harmed by the misrepresentations made by Defendants.

71 In addition, Defendants made numerous material misrepresentations to administrative agencies, builders, plumbers, trade associations, governmental entities, and customers, both orally and in writing, concerning the suitability PB plumbing systems and their component parts, PB tubing, acetal fittings, PB, Celcon or Delrin. Either the Defendants knew these material representations were false when made, or they made the misrepresentations recklessly, without knowledge of the truth, and as positive assertions.

72 Further, Defendants, directly and indirectly, made material misrepresentations or failed to disclose material facts to administrative agencies, builders, plumbers, trade associations, governmental entities, and customers regarding problems associated with PB plumbing systems, PB tubing, acetal fittings, PB, Celcon or Delrin. Defendants made material misrepresentations and omissions while expressing the alleged advantages and suitability of PB plumbing systems, parts, or materials to these entities. Defendants misrepresented fact [sic] that they knew were false and failed to disclose their knowledge of the problems and defects of PB plumbing systems or their parts or materials with the intention of depriving Plaintiffs and other consumers of property or legal rights and otherwise causing injury.

73 Defendants intended, expected or could have reasonably foreseen that code bodies, builders and the plumbing industry would rely on the misrepresentations or omissions made to them, but nevertheless engaged in

such conduct in order to defraud the market. Defendants' conduct proximately caused Plaintiffs' damages more fully described below.

74 Defendants' actions were intentional and reflect their knowing disregard for the rights of Plaintiffs. Therefore, Plaintiffs are entitled to and seek punitive damages.

X.

Civil Conspiracy

75 In addition to all of the above-described misconduct by Defendants, they also engaged in a civil conspiracy, under which they set out to capture the residential and commercial cold-and-hot water plumbing market through unlawful means. As described above, all of the Defendants knowingly and intentionally misrepresented the quality, the character and the capability of PB plumbing systems to code bodies, builders, and the plumbing industry throughout the United States from 1978 to present with the intention of those entities to rely upon their misrepresentations and with the intention of selling such systems to builders and plumbers for placement in Plaintiffs' dwellings and businesses. In doing that, Defendants perpetrated a fraud on the market, and in doing so, Defendants acted in conspiracy with each other. That conspiracy by all of the Defendants proximately caused Plaintiffs' damages described below, and because the conspiracy was intentionally and maliciously carried out, Plaintiffs' are entitled to exemplary damages as well.

76 The Defendants also conspired with one another for the common purpose of defrauding Plaintiffs and

other consumers through the sale and promotion of PB plumbing systems. While marketing PB plumbing systems, or components thereof, the Defendants knowingly and purposely committed one or more concerted acts to defraud the Plaintiffs. As an example, the Defendants failed to disclose the problems associated with PB plumbing systems, PB tubing, acetal fittings, PB Celcon or Delrin, and they made affirmative and false representations regarding the suitability of PB plumbing systems or component parts and materials thereof for use in buildings. By these and other acts, the Defendants intended to defraud Plaintiffs and other consumers, and each Defendants [sic] was aware or understood that the other had such purpose.

77 The Defendants knew that the PB plumbing systems would be installed and were promoted as suitable to be installed in the attics and behind the walls of buildings. The Defendants knew, or should have known, that the use of such systems would result in serious damage, but nevertheless willfully failed to take steps to avoid the probability of serious damage, consciously disregarding of the rights of Plaintiffs and other consumers. The Defendants knew, or should have known, of the probably serious consequences of their conduct and acted in a despicable, willful, wanton, malicious, reckless, and outrageous manner.

78 As a proximate result of such actions in furtherance of this conspiracy, Plaintiffs have been damaged and are entitled to recover from these Defendants, jointly and severally, all damages proximately resulting from the Defendants' wrongful conduct. The Defendants acted with tortious and conscious disregard of Plaintiffs' rights.

Further, the Defendants acted with tortious and conscious disregard of Plaintiffs' rights. Further, the Defendants acted in a wanton and malicious manner for the purpose of causing harm to the Plaintiffs, entitling Plaintiffs to punitive damages as a deterrent to similar behavior in the future.

XI.

Civil RICO

79 Defendants' conduct described above, and particularly that of SHELL, DELANESE, duPONT [sic], VANGUARD, HOUSEHOLD and non-party Brass, violates the Federal Civil Racketeer Influenced Corrupt Organizations (RICO) Act, 18 U.S.C. §1961 *et seq.* Specifically, Defendants were all members of an enterprise engaged in interstate commerce, the purpose of which enterprise was to capture the residential and commercial hot-and-cold-water plumbing market. Furthermore, they conducted the affairs of their enterprise, the PB Enterprise, through a pattern of racketeering activity from 1978 up to 1995. Specifically, SHELL, CELANESE, duPONT [sic], VANGUARD, Brass and HOUSEHOLD, used the United States mails and interstate wires on tens of thousands of occasions to defraud code bodies, builders, developers, and plumbers throughout the United States into approving or purchasing their defective PB plumbing systems with the intent that such systems would be placed in the homes and businesses of Plaintiffs and millions of other Americans. Defendants accomplished that by sending false and misleading information to those code bodies and users in the U.S. mail and by interstate

wires. SHELL, CELANESE, Brass and HOUSEHOLD controlled and directed such enterprise in violation of §1964(a) and (c) of RICO. Furthermore, Defendants conspired with each other to control and direct the PB Enterprise in violation of §1964(d). Defendant SHELL created the enterprise in 1978 shortly after it acquired the polybutylene patent and business from Witco. Brass and CELANESE joined the enterprise shortly thereafter and both maintained an interest in the enterprise throughout the 1980's. HOUSEHOLD acquired Brass in 1981 and actively directed Brass as its subsidiary in its participation in the enterprise from 1981 through April 1989 when it divested itself of Brass because of the unlimited exposure of Brass to PB claimants. In doing so, HOUSEHOLD stripped Brass and its new parent company of $140 million, leaving that entity virtually insolvent, only to succumb to bankruptcy five years later because of the magnitude of PB claims. HOUSEHOLD violated Sections 1962 (a), (c) and (d). The Plaintiffs incorporate by reference their previously filed Statement of Facts Supporting Plaintiffs' RICO Claims, ("RICO Statement"), into this paragraph. Plaintiffs amend such RICO Statement only to explicitly allege that HOUSEHOLD is liable as a principal under § 1962(c).

80 These continuous violations of the Civil RICO Act by SHELL, CELANESE, duPONT [sic], VANGUARD, Brass and HOUSEHOLD from 1978 to the present proximately caused injury to Plaintiffs' properties and businesses as described below. Accordingly, Plaintiffs seek threefold their actual damages, plus costs of suit including a reasonable attorney's fees.

XII.

Discovery Rule, Fraudulent Concealment and Class Action Tolling

81 Defendants have plead limitations as an affirmative defense. Plaintiffs would show that the various statutes applicable herein were tolled by the discovery rule or by the fraudulent concealment of Defendants' wrongful conduct. Specifically, the discovery rule applies to the causes of action founded in Civil RICO and negligence and the fraudulent concealment rule applies to all causes of action. Defendants fraudulently concealed the problems of polybutylene plumbing system through their representations to Plaintiffs and through the document entitled "PB Industry Responds to 60 Minutes." Such representations are discussed above in the section entitled "Fraud". In addition, the Defendants' representatives, the Plumbing Claims Group and the Consumer Plumbing Recovery Center, represented to Plaintiffs that their plumbing systems would be timely replaced with quality materials. Such representations were false and Plaintiffs assert that such representations were simply a ruse to deceive Plaintiffs into foregoing their legal remedies until such time as the Plaintiffs were made part of the class actions and be compelled to accept the limited remedies of the class plaintiffs. In addition, some of the Defendants attempted to limit their liability through class actions of which Plaintiffs, until opting out, were putative members. During the time that Plaintiffs were putative members of the class actions and until they opted out, the statute of limitations was tolled as to Plaintiffs' claims against the class defendants. *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974);

Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 103 S.Ct. 2392, 76 L.Ed.2d 628 (1983); *Vaught v. Showa Denko K.K.*, 107 F.3d 1137, 1147 (5th Cir. 1998). Accordingly, none of Plaintiffs' claims are barred by limitations.

XIII.

Damages

82 Plaintiffs have suffered greatly as a result of Defendants' product and actions. Plaintiffs have already experienced premature failures with the PB plumbing systems, and anticipate that the failures will continue and will increase in frequency over time.

83 Plaintiffs' real and personal property have been severely damaged. As a result of the water damage, among other, the Plaintiffs' properties have experience the problems normally associated with pipe breaks and pipe leaks. The PB plumbing systems will have to be removed and replaced with proper systems for Plaintiffs to ever stop suffering repeated water leaks and the resulting additional damage caused by those leaks. Plaintiffs seek reimbursement for the reasonable value of services and materials required, including plumbing repair materials and supplies, to repair the damage suffered in the past and future as a result of the PB plumbing systems.

84 In addition to the cost of repair or replacement of the PB plumbing systems, Plaintiffs seek damages for the value of lost or destroyed personal property.

85 Plaintiffs additionally seek exemplary or punitive damages, and reasonable and necessary attorneys'

fees for the preparation and trial of this case through its final disposition after all appeals and collection efforts.

86 More specifically, Plaintiffs seek recovery for their losses and damages in the following categories:

a. Cost to repair and restore the buildings;

b. Value of services, supplies, and materials in making past and future repairs to the plumbing systems;

c. Cost to repair or replace the plumbing systems;

d. Value of lost or damaged real and personal property;

e. Expenses associated with moving, relocating or reimbursing tenants;

f. Exemplary and punitive damages;

g. Civil RICO damages;

h. Reasonable and necessary attorneys' fees;

i. Court Costs;

j. Pre-judgment and post-judgment interest; and

k. Such further relief as the Court deems just.

XIV.
JURY REQUEST

87 Plaintiffs have requested a trial by jury and the jury fee has been paid.

XV.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Plaintiffs request that the Defendants be cited to appear and answer this Petition; that Plaintiffs have judgment against the Defendants, jointly and severally, that Plaintiffs recover actual damages, plus pre-judgment and post-judgment interest, plus exemplary or punitive damages, plus other and additional damages as specified above, plus reasonable attorneys' fees and court costs; and that Plaintiffs have such other and further relief, in law and in equity, to which Plaintiffs may show themselves justly entitled.

Respectfully submitted,

/s/ Barry L. Racusin/By [Illegible]
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CERTIFICATE OF SERVICE

This instrument has been served by certified mail, return receipt requested, on all persons on the service list on this the 22nd day of December 1998.

/s/ David D. Ritter
DAVID D. RITTER

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-20622

SUMMIT PROPERTIES INC; SUMMIT PROPERTIES LP; SUMMIT PROPERTIES PARTNERSHIP LP; STONY POINT/SUMMIT LP; MCGREGOR/MCGUIRE LP; HENDERSON/MCGUIRE PARTNERS LP; OAK RIDGE/MCGUIRE PARTNERS LP; WAVERLY PLACE/ SUMMIT PARTNERS LP

Plaintiffs - Appellants

v.

HOECHST CELANESE CORPORATION, formerly known as Celanese Corporation; HOECHST CORPORATION; E I DUPONT DE NEMOURS, AND CO; SHELL OIL COMPANY, doing business as Shell Chemical Company; VANGUARD PLASTICS INC; BOW INDUSTRIAL CORP; HOUSEHOLD INTERNATIONAL INC

Defendants - Appellees

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC

(Opinion 6/7/00, 5 Cir., ___, ___ F.3d ___)

(Filed Jul. 27, 2000)

Before HIGGINBOTHAM and PARKER, Circuit Judges, and WARD,* District Judge.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

Chief Judge King and Judges Jones and Benavides did not participate in the consideration of the rehearing en banc.

REHG-6a

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*District Judge of the Eastern District of Texas, sitting by designation.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SUMMIT PROPERTIES, INC., ET AL.	§	
Plaintiffs,	§	**CIVIL ACTION**
VS.	§	**NO.**
HOECHST-CELANESE CORPORATION f/k/a CELANESE CORPORATION, ET AL.	§	**H-98-1954 JURY**
Defendants.	§	

PLAINTIFFS' STATEMENT OF FACTS SUPPORTING THEIR CIVIL RICO CLAIMS UNDER 18 U.S.C. § 1961 *et seq.*

(Filed Aug. 04, 1998)

Respectfully submitted,

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* * *

PLAINTIFF'S EXHIBIT 1

[LOGO]

Shell Chemical Company
Interoffice Memorandum

FEBRUARY 6, 1981

FROM: A. H. SCHROER

TO: R. F. SCHIMBOR

SUBJECT: MARKETING PLAN – POLYBUTYLENE PLUMBING PIPE RESINS

As the sole supplier to the plumbing pipe resin market, it is in Shell's best interests that this market develop as rapidly as possible. Not only would this be financially advantageous, it would also be strategically key to firmly entrenching ourselves in this profitable end use market segment prior to the time competition develops.

At present, polybutylene plumbing systems are extensively used in the mobile home and recreational vehicle markets but only have a small share of the residential, do-it-youself (DIY) and light commercial plumbing markets. Extensive penetrations into these markets is plagued by

the need to obtain code approvals, increase customer awareness of the features and benefits of the products, and establish an extensive distribution network. Because our customers are, with one exception, small companies, we must take an active role in promoting polybutylene plumbing systems until our customers become strong enough to completely assume that responsibility. This memorandum characterizes the markets for polybutylene plumbing systems by market type (residential construction; mobile homes and recreational vehicles; and remodeling, do-it-yourself, and light commercial), by competitive piping materials, and by geographic regions and describes the channels of distribution traditionally used. In addition, it goes on to define our marketing policies and detail the sales objectives and tactics used to accomplish those objectives.

MARKET CHARACTERIZATION

Market Size and Competition

Total plumbing pipe market size in polybutylene equivalents was estimated at 68MM pounds per year (Table I). Polybutylene and steel had 4 percent of the market in 1979; CPVC, 6 percent, and copper, 86 percent. Approximately 78 percent of this demand is for pipe of diameters smaller than one-inch with the remainder 1-2 inches in diameter.

The bulk of the residential housing market is in the Sun Belt region (South and West in Table II). The remodeling and do-it-yourself (DIY) markets should be distributed across the country, roughly in proportion to the population. The sum then of the residential and

remodeling/DIY market demands is the total market demand (Table III). The demand is broken down by major metropolitan areas in Table IV.

The purchasers in the stick housing and the remodeling/DIY markets are the home builders and plumbing contractors. This market is extremely large – there are 100,000 homebuilders and 125,000 plumbing contractors.

Marketing Channels

Plumbing contractors purchase their supplies at plumbing wholesalers, building product marts, and even local hardware stores although the latter are relatively unimportant. The plumbing wholesalers and building product marts purchase the supplies from the manufacturer frequently utilizing the services of a manufacturer's representative.

Marketing Impediments

Codes constitute the major impediment to the sale of new products. There are numerous layers of codes that must be obtained – national, regional, state, and local codes must all be secured. The code bodies are almost invariably risk-adverse and are frequently influenced by their historical relationships with existing competitive products and labor union elements.

A labor-saving product such as polybutylene plumbing pipe will elicit strong opposition from labor unions. The opposition can take the form of anything from attempts to influence code bodies by logical argument to

outright sabotage of new installations and illegal influence.

MARKETING PLAN

Customers Policy

As previously stated, our current customers are, with one exception, small companies who have limited assets to employ in promoting new products. The present number of seven (see Table V) have adequate extrusion capacity to supply current market demand. It is our intention therefore to let market growth build the cash flow of these companies, strengthening them to the point that they can take over the marketing responsibility from Shall. Adding customers who do not bring enough resources and commitment to either expand the ultimate size of the market or significantly increase the rate of penetration of existing markets will only reduce the cash flow of all existing customers, thereby frustrating our objective of transferring the marketing responsibility to them.

However, if a potential customer did have the resources and commitment to expand the market size or significantly increase the rate of penetration, then we would be interested in adding him to the program. To make a significant impact on the plumbing system market, we feel that the potential customer must have:

(1) a dedication to quality control and the production of quality products

(2) a complete line of fittings and pipe. Since the fittings are a key element in the plumbing systems, they should be proven by subjecting them to a torture test, the exact details of which must be resolved in the first quarter of 1981, preferably with the assistance of an outside testing laboratory like Stevens Institute.

(3) a dedication to standing behind their products as manifested in a guarantee to cover all consequential damages caused by a failure of their system within the first ten years of use. In addition, the company must have the financial ability to make payments if they should arise.

(4) a detailed marketing plan and the requisite resources that would be employed to promote polybutylene plumbing systems. The marketing plan will be subjectively evaluated by Shell to make sure that it will accomplish its stated objectives.

(5) a good payment record

At present, Qest [sic] Products is by far our largest customer, consuming 60 percent of the plumbing pipe resin that we sell. With the additional financial and marketing resources that they have gained through their acquisition by Wallace Murray, they stand to increase their market share still further. Since the dominance of the polybutylene plumbing system market by one company is potentially disadvantageous to us, at least one other strong player should be developed. Among the present customers, Genova is the only one that could make that transition quickly. However, they have been wed to CPVC for 20 years and do not yet show any

indication that they intend to leav [sic] it. As a result, it is likely that an entirely new strong customer must be recruited. Whereas we are already aware of two companies that have the resources to make them strong promoters of polybutylene (Celanese and R. & G. Sloane), a study of all potential candidates should be made so that contingency plans can be developed to accomplish one objective.

Although we have had difficulty in attracting strong players in the past, the marketing successes that we will have during 1981 should convince the doubters that polybutylene plumbing systems are going to displace copper, galvanized, and CPVC. As that realization sinks in, we should have strong companies trying to join our plumbing pipe program. Some time however will be required for this to happen. To minimize the required time, we should begin laying the groundwork with companies that we know can help us if they choose to make the apprpriate [sic] commitment. Initially, this effort would involve planting and reinforcing the idea with Celanese, Genova, and R. & G. Sloane that polybutylene is really starting to go. The first phase would involve contacts at industry/trade association meetings like the PPFA. As interest at the companies begins to escalate, direct calls on the decision-makers in those companies would be made.

Fittings Policy

As the market development of polybutylene plumbing systems proceeds, new fittings systems will be developed. In principle, this is a very favorable development,

potentially enhancing the value and rate of market acceptance of polybutylene plumbing systems. In practice however, it is fraught with risk. There are innumerable ways that fittings systems can fail. Regardless of what caused the failure, it damages the image of polybutylene plumbing systems in the marketplace slowing their rate of penetration. Furthermore, if Shell has tacitly promoted the use of that fitting system, there may be some grounds for legal action against Shell.

To protect ourselves against the adverse consequences of being associated with an inferior fitting system, Shell should require that each manufacturer who wishes to have Shell jointly promote his product submit evidence that his fitting system has passed a standard torture test. This would be the same test referred to earlier under *Customer Policy*.

Fitting Related Activities

Any torture test program set up to evaluate current fittings systems will have to make allowances for the inadequacies of Celcon, the material used in over 99 percent of the current fittings system. Celcon is subject to hydrolysis in acidic solutions. Since acid can accumulate in continuously recycling systems, an alternative to the Celcon would reduce the risks of failures in the field. Efforts should be continued to develop a filled polybutylene that will have an adequate modulus and molding cycle to economically substitute for Celcon.

Developments are required in the socket fusion fitting system, particularly in sizes from one to two inches.

At present, insert fitting systems cannot be used in these sizes. This effectively forecloses the light commercial market from us, a market of 15MM pounds per year. To access that market, we intend to catalyze our customer's development of a full range of socket fusion fittings including transition joints for 1, 1-1/4, 1-1/2, and 2-inch pipe. Specifically, we have offered to purchase from Trojan up to $25,000 of the fittings which would then be made available to the industry (purchase would be contingent upon Shell's agreement on the efficacy of the fittings). This expenditure would partially compensate Trojan for the expense incurred in recoring molds. Availability of the fittings is expected by April.

At present, there is no ASTM standard on insert fittings. This has been a nagging problem at code hearings and represents a potential market difficulty as systems are intermingled as they inevitably will be. An ASTM committee has been formed to develop such a standard. Shell will be represented on that committee by WRC and by S. E. Pregun. Since work on the standard has just begun, it is extremely doubtful that any standard will issue in 1981.

Relationship to Manufacturer's Representatives

In the building products trade, wholesalers have proven to be ineffective in introducing new products. They do not have the resources or the inclination to provide the effort required to get code approvals and teach plumbers how to use the product. They will provide a means of getting the product to the marketplace but must have a market created for them.

Direct sales efforts on the part of the extruder and/or his manufacturer's representative are required to create the market. With our customer mix, the manufacturer's representative is the key selling agent that must be motivated.

The manufacturer's representative normally handles 6-10 lines of products for which markets have already been created and, accordingly, his selling efforts are directed toward wholesalers. For a new product like polybutylene, the manufacturer's representative must develop a market in order to get wholesalers stocking his product. Prior to that time, he must secure local code approvals to sell in that community. As a result of the level of effort required, the manufacturer's representative must devote a disproportionate amount of his time to the new product. The incentive, of course, for this effort is the potential financial gain reaped by displacing other products as well as potential carry-on sales opportunities for his other product lines. Even then there is still a degree of uncertainty that the product will be a success. This, in turn, leads to a reluctance on the part of manufacturer's representatives to invest the time and money to get a market moving when it could be a long time before they have a positive cash flow.

Legally, we must treat each of manufacturer's representatives in an area in an equal fashion. This does not mean that we must spend an equal amount of time with each of them, only that the same offer of assistance be made to each. We will work with those manufacturer's representatives who take us up on our offer of assistance making a commitment of their own time to our mutual goal.

Elements of the Marketing Plan

There are two interrelated segments of the plumbing market – the new construction market and the remodeling/DIY market could be pursued in tandem or sequentially, using the success in one segment to establish the use in the other. To maximize the impact, the latter course was selected, focusing on the residential construction market. Historically, the residential construction market has been the first step in gaining market acceptance. It is more concentrated and is more cost and performance oriented than the remodeling/DIY market. Moreover, success confers more credibility than could be obtained in the remodeling/DIY market.

The major limitations to the growth of polybutylene plumbing systems are (1) a lack of awareness of and credibility for the features and benefits of polybutylene plumbing systems, (2) a lack of code approvals, and (3) a lack of local product availability – all classical problems associated with introducing new products. The program described in the subsequent paragraphs addresses all these areas.

Our advertising and promotional programs are directed toward the key decision makers – the home builder and the plumbing contractor. The programs consist of media advertising, direct mail, collaterial [sic] advertising, trade show participation, and generation of literature and other sales aids. The media program is designed to not only increase awareness but also to build preference. (The media insertion schedule is shown in Table VI.) Where possible, regional buys have been made

to concentrate our advertising in the Sun Belt where the bulk of the new home construction takes place.

The direct mail program consists of a quarterly publication of the "Polybutylene Piper" newsletter and a single direct mail piece intended to prompt further interest. The Piper is sent to the top 5,000 builders in the United States (list purchased from *Professional Builder*), the top 5,000 contractors (list purchased from *Contractor*), influential building code officials and other individuals recommended by the sales force, and all persons who have sent in an inquiry for information. The Piper is designed to build credibility for polybutylene by showing that it is being successfully installed everywhere and to position polybutylene as a premium material that is being used to solve plumbing problems in houses of all price ranges.

Collateral advertising involves the placement of case histories in trade publications. It is our plan to place four such stories during 1981.

During 1981, Shell will participate in the NAHB trade show in January and the Multi Housing World show in March. In addition, portable display booths will be used in regional/state builder and contractor shows.

Basic trade literature will have to be generated to support our sales efforts. Key pieces of literature and the expected timing for them are shown in Table VII.

Product awareness and identification are also inhibited by polybutylene's name. Among home builders and plumbing contractors, polybutylene is a difficult word to pronounce. This decreases product identification in that

buying group. To remedy this shortcoming, a trade name will be selected for the pipe resin early in 1981. The name should be short, easy to pronounce, and incorporate features or benefits on the product.

All of the advertising done during 1981 and subsequent years will utilize the tradename. The reputation established for the tradename between now and 1986 when our exclusive patent rights expire can become a significant asset in maintaining our market position against emerging competition.

We must have credibility for the claims made in our advertising if we are to maximize the rate of market penetration. This will be the place at which the entrenched interest groups (unions and the copper and iron pipe institutes) will strike. To demonstrate that polybutylene plumbing systems perform well, we are targeting our sales efforts on major builders in the areas in which we have code approvals (see listing of top 100 builders, Table VIII). The major builders typically are the innovators in new construction techniques and, because of their scale of operation, thoroughly check out any new system before they commit to it. Ideally, success with major builders can be highlighted by either publication in a trade journal or in the "Piper." As an ancillary benefit, the effectiveness of the sales force will be maximized by working with the largest builders.

Lack of code approvals and local availability can be addressed by either Shell selling efforts or efforts of our customers and their manufacturer's representatives. Because the manufacturer's representatives are much

more numerous (a listing of current manufacturer's representatives is given in Table IX), activities directed to increasing their effectiveness and gaining a larger portion of their time will have a substantial multiplying effect on our own efforts. To improve the effectiveness of the manufacturer's representatives, a number of sales aids in addition to our literature will be developed, e.g., a voice over slide projection that can be used by the representative to sell polybutylene. In addition, the information that Shell has developed on the answers to the technical questions asked by plumbing code bodies, builders, and plumbing contractors needs to [sic] collated and then passed on to the representatives. To be most effective, this should be done in one day product education sessions conducted at each of our customers for all of their manufacturer's representatives. While all of the manufacturer's representatives are together, they should also be advised of the opportunity for polybutylene in other small diameter pipe markets, e.g., water service, underfloor heating, solar, fire sprinkler systems, hydronic heating, ground coupled heat pumps, well piping, and geothermal piping. This portion of the session would concentrate on informing them on how the product should be used and, just as importantly, how it should not be used. Improper application of polybutylene with attendent [sic] failures will damage our positions in the viable growing markets.

As with anyone, manufacturer's representatives are motivated by money. More money than we could reasonably allocate for use as an incentive is already available to the manufacturer's representatives in the form of their commissions – the commissions are roughly 10 percent or $10 per housing start. For this money to serve as an

incentive however, the manufacturer's representative must believe that he can get it and get it in a relatively short period of time. To make it happen quickly, we intend to use Shell sales personnel to assist the representative in intensive market developments or blitzes in major metropolitan areas. In addition to significantly shortening the time required to make a market into a positive cash generator, the intensive development activities significantly reduce the vulnerability associated with product malfunction very early in the development period and increase the efficiency of our sales force by allowing them to reach large numbers of potential buyers in single meetings. As successes begin to mount, polybutylene will gain credibility making future code and development efforts easier.

Further motivation can be generated through sales promotions. We are currently working with our advertising agency to define the type and probable effectiveness of promotional programs.

We have targeted code work during the first half of 1981 to concentrate on consolidating success in geographic areas where we are already active and branching out to highly attractive markets in other regions. A target list of code approvals for the first half of 1981 appears in Table X. Given the uncertainties associated with code approvals, this list must be considered a stretch target in which an approval rate over 75 percent would be considered good. At the same time, other approval opportunities should arise through our customers efforts or as one result of our advertising and could add to the results targeted in Table X.

The schedule of blitzes will follow from code work already done or currently progressing. A schedule of blitzes through the first half of 1981 is shown in Table XI. The schedule in the second half of 1981 will depend upon the code approvals obtained during the first half of 1981.

The blitzes only cover major metropolitan areas. Half of the housing starts in the United States lie outside of these areas. The towns are too small to justify individual calls by Shell salesmen. These methods will be used to spread the success in the major metropolitan areas to the small towns and rural areas: media advertising which has attracted substantial attention in 1981, more extensive use of the manufacturer's representative organization, and display with the plumbing pipe booth at regional/state builders and contractors conventions. The success in the major metropolitan areas will give polybutylene plumbing systems a credibility that will make it much easier to penetrate rural city codes and get local builders using polybutylene. A listing of the regional exhibitions currently scheduled appears in Table XII (more will be added through the year – target number of 12).

The quickest method of increasing the availability of polybutylene plumbing systems is to sign up large chains of plumbing outlets (a list of the major chains is shown in Table XIII). Unfortunately, almost all of these chains purchase centrally and thus are not interested in stocking a product until it begins to gain acceptance through a large portion of their territory. Sales to these chains must wait until the successes slated for the first half of 1981 are obtained. Target chain store accounts for the second half of 1981 are shown in Table XIV. Again, this table shows a stretch target.

With the experience with the "blitzes," we expect that polybutylene sales will exceed 80 percent of ultimate market penetration within four years. The average share during the first year after the blitz should range from 10-25 percent. Assuming reasonably normal building conditions, this means that the blitzes in the first half of 1981 should generate over 700,000 pounds of sales in the following year (contributions of over $300,000). Even greater sales volumes and contributions would be forthcoming in subsequent years.

Our current share of the domestic residential plumbing market is estimated at 3 percent. With the marketing efforts conducted during 1981, we expect to increase that penetration to 5.5 percent. If the projected number of houses are built in 1981, this penetration will result in sales of 1,200M pounds of PB4127. Adding in the mobile home and customer export markets will bring this total to 3,400M pounds. A breakdown of this volume by customer is given in Table XV.

Penetration of the remodeling/DIY market at maximum speed will reqire [sic] the development of a detailed marketing program for this market segment. This in turn will depend upon an analysis of the marketing distribution channels and buying motivation. A consultant study should be used to obtain this information.

Pricing Strategy

Polybutylene plumbing systems are much less expensive on an installed basis than metallic piping systems that occupy the bulk of the market. Compared to CPVC,

the pipe is 20 percent less expensive and polybutylene is easier to install.

Our current price is roughly at parity with that of CPVC and copper. As a result, there is room for our prices to be moved upward. In fact, we have already begun to increase real margins with the last price increase of November 1, 1980. It is proposed that we continue to increase real margins in a gradual fashion to a level in excess of a weighted reinvestment price (contribution from plumbing pipe resins double that of cold water resins and 2-1/2 times that of film resins). The total increase in real margin would be 30-40 percent (a price increase of roughly half as much). So as not to alienate our customers, the increase would be made in a series of roughly equal steps over the next five years. The STOP price for 1981 is 97.0 cpp for the plumbing grades versus the 1980 average price of 82.4 cpp and the current hopper car price of 91.0 cpp.

/s/ A.H. Schroer
A.H. Schroer

cc – S. J. Elstad
R. C. Gust
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Supreme Court, U.S.
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In The

Supreme Court of the United States

SUMMIT PROPERTIES, INC., *et al.*,

Petitioners,

v.

HOECHST-CELANESE CORPORATION f/k/a CELANESE CORPORATION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTION PRESENTED

Whether Petitioners failed to meet the proximate cause requirement for a civil RICO claim this Court prescribed in *Holmes* because Petitioners admittedly did not hear or rely upon the alleged misrepresentations made the basis for their predicate acts of mail and wire fraud.

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The Petitioners have listed all parties in this proceeding, and there are no further parties that warrant mention.

Respondent Shell Oil Company ("Shell") was previously doing business as Shell Chemical Company. Thereafter, Shell Chemical Company was a wholly owned subsidiary of Shell Oil Company. Effective July 2000, Shell Chemical Company was converted to a Delaware limited partnership now known as Shell Chemical L.P., and the General Partner of Shell Chemical L.P. is Shell Oil Company. Shell Oil Company is a wholly owned subsidiary of Shell Petroleum, Inc., a Delaware corporation. Shell Petroleum, Inc. is directly or indirectly owned 60% by Royal Dutch Petroleum Company and 40% by The "Shell" Transport and Trading Company, p.l.c.

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STATEMENT OF THE CASE

This is a "garden variety" state law products liability case that Petitioners have sought to transform into a federal racketeering case. If Petitioners were to prevail on their theory, virtually every products liability case could be brought in federal court–an unprecedented expansion of federal subject matter jurisdiction Congress surely did not intend when it enacted the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961-§ 1968, to combat organized crime. The Fifth Circuit wisely declined to "federalize" products liability law in this fashion. (App. 12a) So should this Court.

Petitioners are owners of apartments and other multi-unit commercial dwellings that filed suit against the Respondents seeking damages for alleged defects in the plastic plumbing systems installed in their buildings. (App. 65a-66a) Respondents Vanguard, Bow, and a subsidiary of Household are manufacturers of the component parts of the plastic plumbing systems. (App. 53a-55a) Respondent Shell manufactured the polybutylene material that the plumbing parts manufacturers extruded to make the plastic plumbing pipe. (App. 52a) Respondents Hoechst-Celanese and DuPont manufactured the acetal material that the plumbing parts manufacturers molded to make the plastic pipe fittings. The Hoechst-Celanese acetal was tradenamed Celcon, and the DuPont acetal, Delrin. (App. 53a)

Petitioners alleged that the plastic pipe and fittings suffered from inherent defects that rendered them unsuitable for use in hot and cold water plumbing systems. (App. 59a-62a) They alleged that over time the plastic plumbing parts degraded in chlorinated water, became brittle, and failed prematurely. (App. 60a) They alleged

that heat and stress at levels found in residential plumbing systems accelerated the degradation process. (App. 62a) Petitioners alleged that, as a result, the plastic plumbing systems in their properties have leaked and caused water damage. (App. 60a) They sought to recover from Respondents the cost of repairing the water damage and replacing the allegedly defective plumbing. (App. 78a) To establish Respondents' liability for their damages, Petitioners alleged conventional products liability theories such as negligence, gross negligence, and strict liability. (App. 66a-70a)

To justify federal subject matter jurisdiction over these state law claims, Petitioners also alleged a violation of RICO. (App. 50a) Petitioners alleged that the Respondents were all members of an "enterprise," the purpose of which was to capture the market for residential and commercial hot and cold water plumbing. (App. 75a-76a) They alleged that the Respondents conducted their enterprise through a "pattern of racketeering activity." (App. 75a-76a) The specific predicate acts of racketeering Petitioners alleged were mail and wire fraud. The mail and wire fraud claims were based on the Respondents' alleged efforts to market the plastic plumbing system to code bodies, builders, developers, plumbers, and other users of plumbing parts. Petitioners alleged that in their promotional activities Respondents used the mails and wires to make various representations about the plastic plumbing system that Petitioners contend were false. (App. 75a-76a)

Significantly, Petitioners did not allege that any of these misrepresentations were ever made directly to them. In fact, they conceded in both the district court and the Fifth Circuit that in purchasing their properties they

did not personally rely on anything Respondents said or published about the plastic plumbing system. (App. 7a, 30a) Similarly, they did not allege that the specific builders and plumbers who installed the plastic plumbing systems in their properties acted in reliance on any misrepresentation made directly to them. Also, they did not allege that the specific code bodies who approved the plastic plumbing system for use in the jurisdictions in which their properties are located acted in reliance on any misrepresentations made directly to them. Rather, Petitioners took the position in both the district court and the court of appeals that under RICO they were not required to allege such individual acts of reliance. (App. 7a) They chose to stand instead on the theory they again bring forward in their Petition–"fraud on the market." (Pet. at 4)

The district court dismissed Petitioners' RICO claim for failure to state a claim on which relief could be granted and declined to exercise supplemental jurisdiction over Petitioners' pendant state law claims on the ground that those were more properly dealt with in the state courts. (App. 33a) The district court noted that "Plaintiffs do not allege that fraudulent communications through mail and wire fraud were directed to them and do not allege that they relied on any of the alleged misrepresentations to third parties." (App. 32a) Based on its review of the civil RICO statute and prior decisions, the district court concluded that "absent an allegation that Defendants made material misrepresentations to Plaintiffs and that Plaintiffs relied on the mail and wire fraud on which the civil RICO claims are predicated, Plaintiffs cannot satisfy the proximate causation requirement for purposes of civil RICO." (App. 32a-33a)

The Fifth Circuit agreed with the district court's analysis. The Fifth Circuit took its cue from this Court's holding in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), that a civil RICO plaintiff must show that the alleged predicate acts of mail or wire fraud were the proximate cause of his injury. (App. 4a) Rejecting Petitioners' contention that they were not required to show reliance on the alleged fraud to satisfy the proximate cause requirement, the Fifth Circuit noted that

> [m]ost other circuits . . . require a showing of detrimental reliance by the plaintiff, which is consistent with *Holmes'* admonition that federal courts employ traditional notions of proximate cause when assessing the nexus between a plaintiff's injuries and the underlying RICO violation.

(App. 7a-8a) The Fifth Circuit reasoned that causation with respect to a fraud claim was different from causation with respect to a products liability claim. The linkage between a design defect and an injury is between the defect and the injury, but with a fraud claim the linkage is between the defendants' fraud and the injury. (App. 8a) The Fifth Circuit noted that, as a product travels in the stream of commerce, inherent defects are carried with it, but fraudulent statements are not. (App. 8a) The causal connection between a misrepresentation and any subsequent harm vanishes once the product travels beyond the entity who actually relied on the representation when making the purchasing decision. (App. 9a, n.19) The court concluded that, even if intermediary builders, plumbers, code officials, or prior owners relied on the Respondents' alleged misrepresentations when choosing to use or approve the PB plumbing system, that did not indicate whether the Respondents' fraud proximately caused the

Petitioners' injuries. (App. 9a, n.19) That is because, unlike products liability theories, fraud addresses liability between persons with direct relationships. (App. 8a-10a) Finally, the Fifth Circuit rejected Petitioners' effort to rely on the securities law concept of "fraud on the market" to satisfy the proximate cause requirement in a product defect context. (App. 11a) Therefore, the Fifth Circuit affirmed the district court's dismissal of Petitioners' RICO claim. (App. 12a)

REASONS THE PETITION SHOULD BE DENIED

I. There Is No Material Conflict Among the Circuits: They Generally Hold That, To Satisfy the Proximate Cause Requirement, a Civil RICO Plaintiff Must Show Detrimental Reliance on the Misrepresentations Made the Basis of His Predicate Mail or Wire Fraud Claims.

A. Overview

The consequences to the federal court system of the proposition Petitioners advance would be devastating. This case is no different than any other products liability case. Here, a plastic plumbing system allegedly proved to be unsuitable for the use for which it was intended. It allegedly failed prematurely, leaked, and caused property damage as well as economic losses to the owners of the buildings containing the plumbing system.

To make a RICO case out of leaking plumbing, Petitioners have focused on the marketing of the plumbing system. They claim that in promoting the sale of the plastic plumbing system, the Respondents made various misrepresentations about the quality and characteristics of the plumbing. (App. 56a-66a) However, as the Fifth Circuit noted, in nearly every products liability case the

seller undoubtedly published marketing materials touting the merits of its product. (App. 12a) If the product turns out to be defective, then those marketing materials may be labeled "fraudulent." Petitioners' theory is that they can sue to recover the damages incurred by reason of a defective product under a RICO mail or wire fraud theory without showing that they ever heard or saw the seller's marketing claims for its product, much less relied upon them. (App. 21-23) If so, there is nothing to distinguish this case from any other products liability case in which the seller of an allegedly defective product has promoted the sale of its product, and all such products liability cases can be brought in federal court under RICO. As the Fifth Circuit properly concluded, Congress could not have intended such a "federalization" of the states' laws of products liability–laws that no one has ever contended are inadequate to address the issue of dangerous or defective products. (App. 12a)

Contrary to Petitioners' argument, the circuits are not in material conflict with respect to the fundamental deficiency in Petitioners' complaint. Since this Court's decision in *Holmes*, every circuit court that has addressed the question has held that, to satisfy the proximate cause requirement, a civil RICO plaintiff alleging mail or wire fraud must show detrimental reliance upon the alleged misrepresentations. To try to manufacture a split among the circuits on this issue, Petitioners have distorted the holdings of cases or relied on inapposite cases involving other predicate acts in which reliance is not an issue. Therefore, Petitioners' claim of conflict among the circuits is wrong and represents no reason for this Court to grant the writ.

B. The Circuits Have Consistently Concluded That Reliance Is Essential to the Proximate Cause Analysis in a Civil RICO Case Based on Mail or Wire Fraud.

A civil RICO plaintiff may recover damages only if he shows that he has been "injured in his business or property by reason of a violation of section 1962." 18 U.S.C. § 1964(c); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 (1985). Thus, as the district court below noted, a civil RICO claim has three separate and distinct elements: (1) a predicate act [§ 1962 violation], *i.e.*, mail or wire fraud; (2) proximate causation ("by reason of"); and (3) injury to the plaintiff's business or property. (App. 31a); *see also Brandenburg v. Seidel*, 859 F.2d 1179, 1187, 1188 n.10 (4th Cir. 1988). This Court has construed the "by reason of" language to incorporate the traditional requirements of proximate causation or legal causation, as opposed to mere factual or "but for" causation. *See Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 265-68 (1992). In other words, "[c]ausation principles generally applicable to tort liability must be considered applicable" in RICO cases. *Brandenburg*, 859 F.2d at 1189.

Proximate causation is a judicial mechanism to limit liability under civil RICO to those who are *directly* injured by the RICO violation. *See Holmes*, 503 U.S. at 268-69. The primary consideration in determining proximate cause is the directness of the relationship "between the injury asserted and the injurious conduct alleged." *Id.* at 268. The purpose of the proximate causation limitation is to preclude recovery by those who complain "of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts." *Id.* After all, RICO does not " 'shield every injury; not does it insure against every

wrong that can be traced to, [as opposed to 'flow from,'] a predicate act.' " *Cullom v. Hibernia Nat'l Bank*, 859 F.2d 1211, 1218 n.15 (5th Cir. 1988) (citing *Sedima*, 473 U.S. at 496-97).

Following the proximate causation guidelines articulated in *Holmes*, the courts of appeal have universally required a showing of detrimental reliance on the predicate acts of mail or wire fraud to ensure the existence of a direct relationship between the injury and the alleged RICO violation.

> SECOND CIRCUIT: *Standardbred Owners Ass'n v. Roosevelt Raceway Assocs. L.P.*, 985 F.2d 102, 105 (2d Cir. 1993); *Metromedia Co. v. Fugazy*, 983 F.2d 350, 368 (2d Cir. 1992), *cert. denied*, 508 U.S. 952 (1993) ("In the context of an alleged RICO predicate act of mail fraud, we have stated that to establish the required causal connection, the plaintiff was required to demonstrate that the defendant's misrepresentations were relied on."); *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1311-12 (2d Cir. 1990).
>
> THIRD CIRCUIT: *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 746-47 (3d Cir. 1996) (detrimental reliance was a necessary component in civil RICO claim predicated on mail and wire fraud).
>
> FOURTH CIRCUIT: *Chisolm v. TranSouth Financial Corp.*, 95 F.3d 331, 337 (4th Cir. 1996); *Caviness v. DeRand Resources Corp.*, 983 F.2d 1295, 1305 (4th Cir. 1993) (dismissing RICO claim where there was no evidence that the plaintiffs relied on an allegedly fraudulent placement memorandum in making their decision to purchase oil and gas wells); *Brandenburg*, 859 F.2d at 1188-90 (civil RICO plaintiffs who base their claims on predicate acts of mail or wire fraud must allege that

they detrimentally relied on the fraudulent statements).

SIXTH CIRCUIT: *Central Distributors of Beer, Inc. v. Conn*, 5 F.3d 181, 184 (6th Cir. 1993), *cert. denied*, 512 U.S. 1207 (1994) (a RICO claim is not actionable unless a fraudulent statement was made to the plaintiff and the plaintiff detrimentally relied on the statement).

SEVENTH CIRCUIT: *Reynolds v. East Dyer Development Co.*, 882 F.2d 1249, 1253-54 (7th Cir. 1989) (home buyers did not rely on any omission to disclose soil problems and, therefore, could not recover under RICO for that failure to disclose).

EIGHTH CIRCUIT: *Appletree Square I, Ltd. Partnership v. W.R. Grace & Co.*, 29 F.3d 1283, 1286 (8th Cir. 1994) ("In order to establish injury to business or property 'by reason of' a predicate act of mail or wire fraud, a plaintiff must establish detrimental reliance on the alleged fraudulent acts.")

ELEVENTH CIRCUIT: *Johnson Enterprises of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1318 (11th Cir. 1998) (court denied plaintiff's civil RICO claims because the alleged misrepresentations were made to third parties and plaintiff did not rely on them); *Pelletier v. Zweifel*, 921 F.2d 1465, 1499-500 (11th Cir.), *cert. denied*, 502 U.S. 855 (1991) ("when the alleged predicate act is mail or wire fraud, the plaintiff must have been a target of the scheme to defraud and must have relied to his detriment on misrepresentations made in furtherance of that scheme.")

This Court has denied petitions for writ of certiorari in all of these cases in which they have been sought.

The rationale for requiring detrimental reliance in a civil RICO claim premised on mail or wire fraud is axiomatic–"a showing of reliance on the predicate act of

fraud ensures the existence of a 'direct relation between the injury asserted and the injurious conduct alleged.' "[1] *Chisolm*, 95 F.3d at 337 (quoting *Holmes*, 503 U.S. at 268). This Court has held in the securities fraud context that "[r]eliance provides the requisite causal connection between a defendant's misrepresentation and a plaintiff's injury." *Basic, Inc. v. Levinson*, 485 U.S. 224, 243 (1988). As the commentators David Smith and Terrance Reed have noted, "[i]mposing a burden on a civil RICO plaintiff to prove justifiable reliance as a necessary means of demonstrating causation is entirely consistent with the Supreme Court [decision] in *Basic*." David B. Smith & Terrance G. Reed, Civil RICO ¶ 9.05, at 9-57 (1996).

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[1] Petitioners cite this Court's decision in *Neder v. United States*, 527 U.S. 1 (1999), for the proposition that the element of reliance has no place in the federal mail and wire fraud statutes. (Pet. at 21-22) In *Neder*, however, this Court was discussing what was required to prove the *crime* of mail or wire fraud. It is well-accepted that a conviction under the mail and wire fraud statutes does not depend on whether anyone was actually defrauded. *See United States v. Blumeyer*, 114 F.3d 758, 767-68 n.6 (8th Cir.), *cert. denied*, 522 U.S. 938 (1997). Therefore, a person can be convicted of mail or wire fraud even if no one ever actually relied on the fraudulent statements.

Recovery of damages under the civil RICO statute is a different matter. As this Court noted in *Neder*, " '[c]ivilly of course the [mail fraud statute] would fail without proof of damage, but that has no application to criminal liability.' " 527 U.S. 25 (citing *United States v. Rowe*, 56 F.2d 747, 749 (2d Cir.), *cert. denied*, 286 U.S. 554 (1932)). The Fifth Circuit's holding in this case does not involve an examination of mail and wire fraud–the underlying crime alleged–but of proximate causation, which is a distinct and separate element of a civil RICO violation.

Petitioners do not allege that Respondents made any misrepresentations to them regarding the plastic plumbing system or that they relied on any such misrepresentations in deciding to purchase the properties containing the plastic plumbing system. (App. 7a, 30a) In addition, Petitioners do not allege that Respondents made any specific misrepresentations to the code officials in the specific jurisdictions in which their properties were located or that those code officials made any decisions based on the allegedly misleading statements. Similarly, they fail to allege that Respondents made any specific misrepresentations to the builders who built their properties or that those builders chose to install PB plumbing systems in those properties as a result of any such misrepresentations. Thus, all Petitioners have is a general claim that the Respondents' marketing materials were false, but no allegations that the misrepresentations had any direct impact on anyone in the actual chain of events involved in the development, construction, and acquisition of their buildings. Given these facts and given the prior decisions set forth above, no other circuit would have decided this case any differently than the Fifth Circuit.

Indeed, the Eighth Circuit has reached the same result in a case strikingly similar to this one. In *Appletree Square I, Ltd. Partnership v. W.R. Grace & Co.*, 29 F.3d 1283 (8th Cir. 1994), the plaintiff sued to recover the cost of removing asbestos-containing fireproofing material installed in its commercial office building. *Id.* at 1284. In addition to state law claims, the plaintiff brought a civil RICO claim based on predicate acts of mail and wire fraud. *Id.* at 1286. The Eighth Circuit held that, to establish injury to the plaintiff's business or property "by

reason of" the mail and wire fraud, the plaintiff "must establish detrimental reliance on the alleged fraudulent acts." *Id.* The plaintiff admitted that the defendant manufacturer of the fireproofing material never made any misstatements about the material specifically to it or that it relied on any alleged misrepresentations in purchasing the building. *Id.*

Instead, the plaintiff attempted to establish detrimental reliance through a "fraud on the market" theory. The plaintiff argued that if the defendant "had disclosed to the 'marketplace' the hazards associated with [the fireproofing material], [plaintiff] would not have purchased a building containing [the fireproofing material] or at least would have negotiated a lower purchase price for the building." *Id.* at 1287. Like the Fifth Circuit here, the court in *Appletree* flatly rejected the fraud on the market theory:

> Courts generally have limited the use of the fraud-on-the-market theory to securities fraud cases. The theory permits a plaintiff to establish a rebuttable presumption of reliance based upon the premise that "the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations." . . . The theory does not apply to [plaintiff's] case because the presumptions underlying the theory are not present. The real estate market, unlike the stock market, is not a well-developed market in which the price of a building reflects all publicly available information. Thus, [plaintiff] cannot employ the fraud-on-the-market theory to establish detrimental reliance.

Id. at 1286 (citation omitted). Because the plaintiff did not show that it detrimentally relied on any of the alleged

misrepresentations in its purchase of the building, the Eighth Circuit held that the plaintiff failed to establish that the alleged misrepresentations proximately caused its claimed injuries, and thus, lacked standing to bring its civil RICO claims. *Id.*

C. There Is No Conflict Among the Circuits Regarding Whether a Civil RICO Plaintiff Must Prove Reliance.

Despite the litany of cases clearly requiring reliance on alleged mail or wire fraud in civil RICO cases, Petitioners have attempted to manufacture a "conflict" among the circuit courts where none exists.[2] To do this, Petitioners rely in part on decisions that were decided before this Court emphasized in *Holmes* that recovery under civil RICO includes a traditional proximate cause element. In addition, many of the cases cited by Petitioners are bribery cases, which are factually distinguishable from the predicate acts of mail or wire fraud at issue here. Finally, some of the cases on which Petitioners rely simply do not support the proposition for which they are cited.

1. There Is No Conflict With the Second Circuit.

Petitioners contend that two Second Circuit opinions support their theory of a conflict among the circuit courts: *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295 (2d Cir. 1990); and *Standardbred Owners Ass'n v.*

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[2] Petitioners concede that the Fifth Circuit's opinion in this case is in harmony with the rule prevailing in the Sixth and Seventh Circuits. (Pet. at 23-24)

Roosevelt Raceway Assocs. L.P., 985 F.2d 102 (2d Cir. 1993). (Pet. at 13-14)

Contrary to Petitioners' assertion, the court in *Standardbred* followed a traditional reliance approach to proximate causation. In *Standardbred* the plaintiffs alleged that the defendants falsely represented to them that they intended to continue harness racing at Roosevelt Raceway. Acting in reliance on these fraudulent statements, the plaintiffs purchased equipment and made other expenditures for the purpose of racing horses at the Raceway. The Second Circuit held that plaintiffs had standing under civil RICO to recover these "fraudulently induced" damages. 985 F.2d at 104-05.[3] That result is completely consistent with the Fifth Circuit's opinion in this case.

Suffolk is also a reliance case. In *Suffolk* the plaintiff ratepayers alleged that the defendant utility made unduly optimistic predictions about the construction status and costs of a nuclear power plant which it was building and thereby caused the New York Public Service Commission ("PSC") to grant the utility unwarranted and excessive rate increases. 907 F.2d at 1300. The Second Circuit affirmed a j.n.o.v. in favor of the defendant on the plaintiffs' civil RICO claims. *Id.* at 1301. The Second Circuit held that, to satisfy the proximate cause requirement of *Holmes*, it was necessary for the plaintiffs to establish that the defendant's misrepresentations to

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[3] The Second Circuit itself has agreed that its decision in *Standardbred* was based on the plaintiff's reliance on the alleged fraud. *See Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 237-38 (2d Cir. 1999), *cert. denied*, 120 S. Ct. 799 (2000).

PSC were relied upon by the PSC, and that such misrepresentations caused the defendant's rate increase to be granted. *Id.* at 1311. The Second Circuit held that the plaintiffs' RICO claims failed because their evidence was insufficient to establish the required causal connection. *Id.* at 1311-12.

The holding in *Suffolk* is consistent with the Fifth Circuit decision here. The only difference is that, under the peculiar facts of that case pertaining to utility ratemaking, the court in *Suffolk* apparently would have allowed the reliance of the PSC to suffice. That difference, however, is immaterial to this case because Petitioners also did not allege that any specific intermediary involved with their properties–code officials, builders, or plumbers–ever heard or relied upon any alleged misrepresentation by the Respondents. Therefore, this case would be an inappropriate vehicle for the Court to address the issue whether the reliance requirement can be met by the reliance of a third party.

2. There Is No Conflict With the Third Circuit.

For the supposed conflict between the Fifth Circuit's opinion and the Third Circuit, Petitioners rely on *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052 (3d Cir. 1988), *aff'd on other grounds*, 493 U.S. 400 (1990). (Pet. at 8-9) However, *Environmental Tectonics* preceded this Court's decision in *Holmes*. As a result, it does not analyze the proximate cause issue in the manner prescribed by *Holmes*.

Moreover, *Environmental Tectonics* was a bribery case, not a fraudulent misrepresentation case. The plaintiff alleged that, as a result of a competing bidder's bribery of a public official, the plaintiff lost the bid for a military

procurement contract. 847 F.2d at 1067. The causation analysis in such a bribery case is obviously different than in a fraud case. In a bribery case the target of the bribe is not a victim and cannot bring a civil RICO suit. Therefore, it is necessary to go further down the causal chain to identify the person who has been wronged and is, therefore, the proper plaintiff in a bribery case. In the bribery context the person wronged is the rival bidder who lost the contract. The requisite causal connection in such a case is not reliance, but whether the bribery of the official caused the plaintiff to lose the bid. Thus, a bribery case such as *Environmental Tectonics* says nothing about whether the Third Circuit requires reliance to establish proximate cause in a civil RICO claim premised on fraudulent misrepresentations.

3. There Is No Conflict With the Fourth Circuit.

Petitioners argue that two decisions in the Fourth Circuit are "squarely in conflict" with the Fifth Circuit's opinion here: *John C. Holland Enters. v. J.P. Mascaro & Sons*, 653 F. Supp. 1242 (E.D. Va.), *aff'd mem.*, 829 F.2d 1120 (4th Cir. 1987); and *Chisolm v. TransSouth Fin. Corp.*, 95 F.3d 331 (4th Cir. 1996). (Pet. at 14-16)

But the unpublished *John C. Holland* opinion certainly does not represent the position of the Fourth Circuit on the proximate cause issue. The district court examined only whether the plaintiff had established the requisite elements of the predicate act of mail and wire fraud. 653 F. Supp. at 1242. Perhaps because the case preceded *Holmes*, the district court never analyzed the proximate cause element of a civil RICO claim. The plaintiff thereafter voluntarily dismissed its civil RICO claim. 1987 WL

38095, at *1. As a result, the Fourth Circuit's unpublished opinion does not address *any* RICO issue, much less proximate cause. *Id.*

Petitioners' argument that *Chisolm* squarely conflicts with the Fifth Circuit's decision here is completely specious. In fact, in *Chisolm* the Fourth Circuit noted that in *Brandenburg v. Seidel*, 859 F.2d 1179 (4th Cir. 1988),

> We said that, where the predicate act giving rise to civil liability under RICO was alleged to have been mail fraud, prospective plaintiffs must, in order to demonstrate their standing to sue, plausibly allege both that they detrimentally relied in some way on the fraudulent mailing and that the mailing was a proximate cause of the alleged injury to their business or property.

95 F.3d at 337 (citations and footnote omitted). In *Chisolm* the Fourth Circuit also reaffirmed that "where fraud is alleged as a proximate cause of injury, the fraud must be a 'classic' one. In other words, the plaintiff must have justifiably relied, to his detriment, on the defendant's material misrepresentation." *Id.* Thus *Chisolm* is entirely consistent with the Fifth Circuit's opinion in this case.

4. There Is No Conflict With the Eighth Circuit.

Petitioners argue that three decisions in the Eighth Circuit are "at odds" with the Fifth Circuit's opinion here: *Atlas Pile Driving Co. v. DiCon Financial Co.*, 886 F.2d 986 (8th Cir. 1989); *Bieter Co. v. Blomquist*, 987 F.2d 1319 (8th Cir.), *cert. denied*, 510 U.S. 823 (1993); and *United HealthCare Corp. v. American Trade Ins. Co.*, 88 F.3d 563 (8th Cir. 1996). (Pet. at 9-11)

However, *Atlas Pile Driving* was decided before this Court's admonition in *Holmes* that a civil RICO plaintiff's

injuries must be proximately caused by the predicate act of mail or wire fraud. The *Atlas Pile Driving* opinion contains no discussion of the proximate cause requirement in a RICO claim. Rather, the decision in *Atlas Pile Driving* is limited to whether the plaintiffs had sufficiently established predicate acts of mail or wire fraud. 886 F.2d at 990-93.

Similarly, the only discussion of reliance in *United HealthCare* involved the issue of whether reliance is required to prove the predicate act of mail or wire fraud, which it unquestionably is not. 88 F.3d at 571 & n.5. The court did not discuss reliance in connection with the proximate cause element of a civil RICO claim because the defendant did not seek to challenge proximate cause on the basis of non-reliance. The defendant argued instead that the plaintiff had not been injured at all because he had in fact received the insurance coverage for which he paid premiums. The court found that the plaintiff had not received insurance coverage, and thus, had been injured by reason of the defendants' misappropriation of the plaintiff's insurance premiums. *Id.* at 572.

Finally, *Bieter*, like *Environmental Techtonics*, involved bribery of a public official, rather than fraudulent misrepresentations. As previously noted, the causation analysis in a bribery case is fundamentally different from a fraud case. Therefore, *Bieter* does not say anything about whether the Eighth Circuit requires a showing of reliance in fraudulent misrepresentation cases. On the other hand, when the Eighth Circuit subsequently spoke directly to that issue in *Appletree*, it said squarely that "to establish injury to business or property 'by reason of' a predicate

act of mail or wire fraud, a plaintiff must establish detrimental reliance on the alleged fraudulent acts." 29 F.3d at 1286.

5. There Is No Conflict With the Eleventh Circuit.

Citing *Pelletier*, Petitioners concede that "in simple, two-party misrepresentation cases" the Eleventh Circuit, like the Eighth Circuit, follows a reliance requirement similar to that of the Fifth Circuit. 921 F.2d 1465 (11th Cir. 1991). (Pet. at 12) Nevertheless, they argue that three cases in the Eleventh Circuit are in "square conflict" with the Fifth Circuit opinion: *Taffett v. Southern Co.*, 930 F.2d 847 (11th Cir. 1991), *cert. denied*, 506 U.S. 1021 (1992); *Cox v. Administrator United States Steel & Carnegie*, 17 F.3d 1386 (11th Cir. 1994), *cert. denied*, 513 U.S. 1110 (1995); and *All Care Nursing Service, Inc. v. High Tech Staffing Servs., Inc.*, 135 F.3d 740 (11th Cir. 1998), *cert. denied*, 526 U.S. 1016 (1999). (Pet. at 11-12) This is a strange group of cases on which Petitioners rely.

First, *All Care Nursing Service* acknowledges the rule in *Pelletier* that reliance is required "to the extent that a RICO plaintiff must prove he was injured by reason of the RICO defendant's deception and fraud." 135 F.3d at 745 n.10. The court simply held that there was no argument that the injury was inadequately shown. *Id.*

In *Taffett*, like *Suffolk*, plaintiff ratepayers contended they had paid higher utility rates as a result of fraudulent misrepresentations which the defendants allegedly made to local rate-making agencies. To create the supposed conflict in *Taffett*, Petitioners rely on the panel opinion reported at 930 F.2d 847. However, the Eleventh Circuit

granted rehearing en banc and vacated the panel's opinion. 958 F.2d 1514. Upon rehearing, the court held that under the "filed rate doctrine" the plaintiff ratepayers had suffered no legally cognizable injury. As a result, the court never reached any proximate cause issue. 967 F.2d 1483. This Court denied the plaintiffs' petition for writ of certiorari. 506 U.S. 1021 (1993). Thus, *Taffett* does not conflict with the Fifth Circuit's decision.

Finally, *Cox* is another bribery case. Union members brought a RICO action against the union and their employer alleging that union negotiators had agreed to concessions in a collective bargaining agreement in exchange for pension payments to which they were not entitled. As in all bribery cases, reliance by the union members was not the issue in the causation analysis. Instead, the court held that

> the element of causation is satisfied if the Union negotiators were influenced to make any amount or degree of concessions in the subsequent rounds of negotiations by their desire to convince the Company to agree to their outstanding illegal request coupled with the Company's failure to reject the pension request from the beginning.

17 F.3d at 1400. Thus, the causation analysis in *Cox* focused on whether the bribes paid to the union negotiators caused the union contract to be less favorable to union employees than it would have been in the absence of the bribes. The court held that because the plaintiffs produced evidence that the bribes caused concessions in the collective bargaining agreement, they met their burden of establishing proximate cause. *Id.* at 1403. *Cox* says nothing about the proximate cause analysis in a case involving allegedly fraudulent misrepresentations.

6. There Is No Conflict With the District of Columbia Circuit.

Petitioners argue that the Fifth Circuit's proximate cause analysis was "squarely rejected" by the District of Columbia Circuit in *BCCI Holdings (Luxembourg), S.A. v. Khalil*, 214 F.3d 168 (D.C. Cir.), *cert. denied*, 121 S. Ct. 382 (Oct. 30, 2000). (Pet. at 17)

However, the *BCCI* case is clearly distinguishable because of the nature of the RICO allegations. *BCCI* involved a scheme to allow BCCI secretly to acquire ownership of First American Bank in violation of the United States banking laws. BCCI's management agreed to pay the defendant large sums of money in exchange for the defendant's consent to act as the nominee shareholder of First American on behalf of BCCI. 214 F.3d at 170. The RICO action was brought by the liquidators of BCCI. The damages that the district court awarded the liquidators consisted largely of the various monies that BCCI paid to the defendant and affiliated companies in return for the defendant's participation in the nominee stockholder scheme. *Id.* at 171.

The District of Columbia Circuit affirmed the district court's finding that these damages were proximately caused by the RICO violation. *Id.* at 174. The court did not discuss reliance in the context of the civil RICO claim because, due to the particular character of the RICO violation, reliance was not an issue. BCCI had clearly lost the money paid to the defendant as a result of the RICO violations. The one exception was $62,021,193 in silver and copper trading losses. The District of Columbia Circuit held that there was no evidence those losses were traceable to the use of the defendant's name, as opposed to market conditions. *Id.* This is consistent with the Fifth

Circuit's approach that, where multiple intervening factors exist, there must be evidence directly linking the alleged fraud and the plaintiff's injuries. Thus the *BCCI* decision represents no conflict with the Fifth Circuit.

II. The Fifth Circuit Correctly Held That Under the Facts of This Case Reliance Was Critical to the Proximate Cause Analysis.

In addition, whether reliance is or is not always required, the courts below clearly reached the right result in this case. While Petitioners have argued that reliance is a sufficient, but not a necessary, means of showing proximate cause, they have never shown by what other means they met the proximate cause requirement under the specific facts of this case. This case involves a chain of decisionmaking through which the alleged fraud had to pass–including code bodies, builders and plumbers, and the purchasers of the properties in question. Obviously at each level in the chain multiple factors could go into making the relevant decision. Under the facts of this case it would be virtually impossible to conceive of a theory of proximate cause that does not include some type of reliance. In the absence of reliance this case presents precisely the situation in which this Court in *Holmes* indicated proximate cause was lacking.

A. Because of Multiple Intervening Factors There Is No Necessary Direct Relationship Between the Alleged Fraud and Petitioners' Damages.

In the absence of reliance there is no necessary causal connection between the alleged fraud in this case and Petitioners' injury. Here Petitioners allege that Respondents made false marketing claims about the qualities of

the plastic plumbing system. However, before the alleged fraud could be said to have had any impact on Petitioners, it had to pass through at least three different levels in the distribution chain:

(1) A code body had to decide to approve the plastic plumbing system for use in its jurisdiction;

(2) A developer, builder, or plumbing contractor had to decide to purchase and install the plastic plumbing system in a particular building; and

(3) Petitioners had to decide to purchase the building containing the plastic plumbing system.[4]

Each of these steps required an independent decision based on many factors. Whether the alleged fraud proximately caused Petitioners' injuries depends on the knowledge, conduct, and decisionmaking processes of these independent actors.

There is no necessary direct relationship between the Respondents' allegedly fraudulent marketing claims and the conduct and decisions of these intervening actors. For example, it is possible that the code body authorities: (1) conducted an independent evaluation of the Respondents' marketing claims; (2) obtained opinions from other experts in the plumbing industry; and (3) decided that while they did not believe the Respondents' marketing

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[4] Notably, Petitioners themselves never purchased the allegedly defective plumbing system. Instead, they purchased apartment complexes and other commercial buildings in which the plumbing systems were purchased and installed by a third party.

claims, nevertheless the plastic plumbing system had sufficient advantages to warrant making it available to interested users. Similarly, it could be that developers, builders and plumbing contractors: (1) made their own evaluation of the plastic plumbing system; or (2) relied on their own prior successful use of the product; or (3) relied on the advice of other builders or contractors who had successfully used the product; and (4) recognized that, contrary to the Respondents' marketing claims, the plastic plumbing system was not as good as copper, but considered that to be outweighed by its lower cost and ease of installation. It is further possible that Petitioners: (1) purchased the building after having the plumbing inspected; (2) knew that the building contained the plastic plumbing system; (3) understood that it might wear out faster than copper, and, if so, would have to be replaced; but (4) nevertheless found the price of the building sufficiently attractive to go ahead with the purchase. The multiplicity of other possible intervening causes makes reliance critical to a finding of proximate cause in this case. The only way Petitioners could negate the existence of these other causal factors–and establish the necessary direct connection between the Respondents' allegedly false marketing claims and their injury–is to show that they heard and relied on the alleged fraud.

Indeed, in the absence of reliance, this case presents many of the problems that led this Court in *Holmes* to insist that the alleged RICO violation be the proximate cause of the plaintiff's injuries. One is the difficulty of ascertaining the amount of the plaintiff's damages attributable to the RICO violation, as distinct from other independent factors. 503 U.S. at 269. In the absence of reliance, there is no way to determine to what extent

Petitioners' damages were due to the alleged mail or wire fraud, as distinct from other possible intervening decisions and actions.

Another problem this Court highlighted in *Holmes* was the difficulty of apportioning damages among plaintiffs removed at different levels of injury from the RICO violations so as to avoid multiple recoveries. *Id.* In this case, there are clearly different levels in the chain of distribution at which injury could conceivably have been sustained. Petitioners themselves acknowledge the damages also suffered by the builders and plumbers who purchased and installed the plastic plumbing system and who, if the system is defective, may be required to repair or replace it. (Pet. at 20) In the absence of reliance–establishing a direct link between the alleged violation and Petitioners' injuries–the problem of apportioning damages among these different plaintiffs would be very complicated.

Finally, as this Court observed in *Holmes*, the need to grapple with these problems is unjustified since there are other "directly injured victims" who can themselves bring suit. *Id.* Petitioners allege that Respondents defrauded developers, builders, and plumbers into purchasing and installing the plastic plumbing system in their buildings. If we credit Petitioners' fraud theory,[5] those parties are indisputably the direct victims of the alleged fraud. When the plastic plumbing system proved defective, they could have been required to repair or

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[5] In this case, however, Petitioners alleged fraud only on the building market in general. They failed to allege that the specific builders and plumbers who installed the plastic plumbing system in Petitioners' properties ever heard or relied upon any alleged misrepresentations.

replace the system, suffered damages to their professional reputations, and been subject to suit by the ultimate purchasers of the buildings. Those injuries would be ample incentive to sue.

As this Court cautioned in *Holmes*, allowing civil RICO suits like this one "would open the door to 'massive and complex damages litigation' which would not only burden the courts, but would also undermine the effectiveness of treble-damages suits." *Id.* at 274.

B. Other Courts Have Recognized That Directness of Injury Is Required To Avoid the Impossibility of Ascertaining the Amount of An Injury Caused By Fraud Rather Than Other Factors.

Under similarly attenuated circumstances in which there are multiple intervening factors, other courts have held that the difficulty of apportioning the degree of the plaintiff's injury caused by the alleged wrongful conduct, as opposed to other factors, suggests a lack of requisite proximate causation.

For example, in *Laborers Local 17 Health and Benefit Fund v. Phillip Morris, Inc.*, 191 F.3d 229 (2d Cir. 1999), *cert. denied*, 120 S. Ct. 799 (2000), the Second Circuit examined civil RICO claims by labor union health and welfare trust funds against tobacco companies and held that, because the claims were indirect, they did not meet the proximate causation requirement.

> [T]he damage claims here are incredibly speculative. It will be virtually impossible for plaintiffs to prove with any certainty: (1) the effect any smoking cessation programs or incentives would have had on the number of smokers

> among the plan beneficiaries; (2) the counter-effect that the tobacco companies' direct fraud would have had on the smokers, despite the best efforts of the Funds; and (3) other reasons why individual smokers would continue smoking, even after having been informed of the dangers of smoking and having been offered smoking cessation programs.

Id. at 239-40; *see also Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 921 (3d Cir. 1999), *cert. denied*, 528 U.S. 1105 (2000).

Likewise, in *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763 (2d Cir. 1994), *cert. denied*, 513 U.S. 1079 (1995), the plaintiff brought a RICO claim alleging that the defendants misrepresented the value of real estate pledged as collateral to induce the plaintiff to make non-recourse loans to the defendants. The Second Circuit affirmed the dismissal of the claim on the ground that the plaintiff failed to establish proximate causation. The court wrote that when factors other than the defendant's fraud are an intervening direct cause of a plaintiff's injury that same injury cannot be said to have occurred by reason of the defendant's actions. *Id.* at 769. The deficiency in the plaintiff's claim was that it could not show its losses were attributable to the alleged fraud, as distinct from other factors such as the general decline in the New York real estate market.

The Third Circuit also addressed the proximate causation issue in *Callahan v. A.E.V., Inc.*, 182 F.3d 237 (3d Cir. 1999). In *Callahan*, a small beer distributorship alleged that the defendant had acquired more beer distributorships than Pennsylvania law allowed by making false statements to the liquor control board and that, as a result

of his illegal acquisition of a large number of distributorships, he was able to extract from wholesalers substantial discounts not available to smaller competitors. The Third Circuit affirmed the district court's dismissal of the RICO claims, in part, because of the difficulty in ascertaining the market advantages and profits obtained by the defendant due to fraud on the liquor control board, as opposed to the defendant's negotiating ability, size of his individual stores, the operating methodology of his stores, or other legitimate actions. *Id.* at 264.

Here Petitioners assert a similarly attenuated factual scenario in which Respondents' marketing efforts allegedly induced local and national code bodies, developers, homebuilders and plumbers to approve or install certain plumbing components in buildings that Petitioners later purchased. However, it is indisputable that code officials and regulatory agencies necessarily use a complex mix of inputs and judgments when adopting a particular code or regulatory decision. *See Sizemore v. Georgia-Pacific Corp.*, 1996 WL 498410, at *9 (D.S.C. Mar. 22, 1996), *aff'd mem.*, 114 F.3d 1177 (4th Cir. 1997). Likewise, commercial real estate builders and developers utilize myriad factors in making business decisions about which products to use on construction projects. Obviously the purchaser of an apartment building makes his decision based on a variety of different factors. In the absence of an allegation that they relied on the alleged fraud, Petitioners' allegations in this case are simply too indirect and speculative to show causation because of the multiple other factors that may have caused the plastic plumbing system to be present in the properties Petitioners eventually purchased.

CONCLUSION

No conflict among the circuit courts exists with respect to the issue in question: all maintain that in civil RICO cases based on alleged mail or wire fraud reliance is essential to satisfy the proximate cause requirement of *Holmes*. Moreover, whether or not reliance is always required, the Fifth Circuit was clearly correct in its holding that, under the facts of this products liability case, Petitioners could not maintain their civil RICO claim in the absence of an allegation that the Respondents' allegedly fraudulent statements were made directly to them and that they relied upon them in purchasing their properties. Any other rule would make RICO an avenue for bringing all state law products liability cases in federal court–which was surely not the purpose and intent of the RICO statute.

Respectfully submitted,

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In The

Supreme Court of the United States

SUMMIT PROPERTIES, INC., *et al.*,

Petitioners,

v.

HOECHST-CELANESE CORP., formerly known as CELANESE CORP., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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18 pp

QUESTION PRESENTED FOR REVIEW

Whether a Civil RICO plaintiff must plead and prove that he or she received, and detrimentally relied upon, the alleged mail or wire fraud in order to establish proximate causation between the violation and injury?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Household International, Inc. ("Household International") is a holding company whose stock is publicly traded on the New York Stock Exchange. There is no parent or publicly held company owning ten percent (10%) or more of Household International's stock.

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STATUTORY PROVISIONS

18 U.S.C. § 1341, in relevant part, provides:

> Whoever, having devised . . . any scheme . . . to defraud . . . **for obtaining money or property** . . . by means of false or fraudulent pretenses, representations, or promises . . . places in any post office . . . any matter . . . to be sent or delivered by the Postal Service . . . shall be fined . . . or imprisoned . . . (emphasis added).

18 U.S. C. § 1343, in relevant part, provides:

> Whoever, having devised . . . any scheme . . . to defraud . . . **for obtaining money or property** . . . by means of false or fraudulent pretenses, representations, or promises, transmits . . . by means of wire . . . communication in interstate or foreign commerce, any . . . signals . . . for the purpose of executing such scheme . . . shall be fined . . . or imprisoned . . . (emphasis added).

STATEMENT OF THE CASE

Petitioners' Statement of the Case contains several inaccuracies, most notably, the Petitioners have misstated the Question which should be reviewed. [Petition at 2]. Petitioners seek review of an order issued by the District Court for the Southern District of Texas, Houston Division, in which the trial court held that:

> The Court concludes, based on its review of the civil RICO statute and the cases cited herein, that absent an allegation that Defendants made material misrepresentations to Plaintiffs and

> that Plaintiffs relied on the mail and wire fraud on which the Civil RICO claims are predicated, Plaintiffs cannot satisfy the proximate causation requirements for purposes of Civil RICO. As a result, Plaintiffs [sic] Civil RICO claim must be dismissed.

[Petitioners' Appendix at 25a]. Therefore, the correct Question to be reviewed is "Whether a Civil RICO plaintiff must plead and prove that he or she received, and detrimentally relied upon, the alleged mail or wire fraud in order to establish proximate causation between the alleged violation and injury?"

The Petitioners also misstate the holdings of the various circuit courts on whether a Civil RICO plaintiff, in a claim based upon the predicate acts of mail and/or wire fraud, must plead and prove that they detrimentally relied upon the alleged fraudulent communications. [Petition at 3]. Contrary to Petitioners' assertions, the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits clearly say "yes."[1]

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[1] *Metromedia Co. v. Fugazy*, 983 F.2d 350, 368 (2nd Cir. 1992); *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 746-47 (3rd Cir. 1996); *Chisolm v. TranSouth Fin. Corp.*, 95 F.3d 331, 337 (4th Cir. 1996); *Summit Properties, Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556, 562 (5th Cir. 2000) and *Heden v. Hill*, 937 F. Supp. 1230, 1243 (S.D. Tex. 1996); *Central Distributors of Beer, Inc. v. Conn*, 5 F.3d 181, 184 (6th Cir. 1993); *Reynolds v. East Dyer Dev. Co.*, 882 F.3d 1249, 1253 (7th Cir. 1989); *Appletree Square I Ltd. Partnership v. W. R. Grace & Co.*, 29 F.3d 1283, 1286 (8th Cir. 1994); *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1481 (9th Cir. 1997); *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 892 (10th Cir. 1991); *All Care Nursing Service, Inc. v. High Tech Staffing, Inc.*, 135 F.3d 740, 745 n.10 (11th Cir. 1998) and *Pelletier v. Zweifel*, 921 F.2d 1465, 1499-1500 (11th Cir. 1991).

Accordingly, ***because there is no conflict among the circuits,*** Petitioners' statement that this Petition presents the Court with an apt vehicle to settle the conflict among the circuits is false. *Id.*

Additionally, Petitioners' "apt vehicle" assertion is false because, regardless of the outcome of this Petition: (A) these Petitioners cannot assert a valid RICO claim based on this Court's recent ruling in *Cleveland v. United States*, ___ U.S. ___, 121 S.Ct. 365, 69 USLW 4003 (2000), (B) the underlying dismissal order could be affirmed on alternative grounds, and (C) there is no adequate factual record upon which this Court could conduct its review.

Finally, Petitioners are incorrect when they state that the **Respondents** are manufacturers that marketed PB pipes and acetal fittings. [Petition at 3]. **Respondent** Household International has never designed, manufactured, or marketed any plumbing system. [Household International Appendix at App. 15]. Furthermore, Household International has never provided any raw material used in any plumbing system. *Id.* Household International's only alleged connection to this lawsuit stems from its former ownership of a subsidiary company, Household Manufacturing, Inc.,[2] which in turn owned United States Brass Corporation, a company that did design, manufacturer and market PB pipes and acetal

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[2] Long after United States Brass Corporation began designing, manufacturing and/or marketing polybutylene plumbing systems (mid to late 1970's), Household International owned Household Manufacturing, Inc. (later known as Eljer Manufacturing, Inc.) for a brief period of time (February 20, 1981 to April 14, 1989).

fittings. *Id.* Consequently, because **Respondent** Household International did not design, manufacturer or market PB pipe and acetal fittings, Petitioners also make misstatements when they state that:

> Shell orchestrated a complex "scheme to defraud" between itself and the other **Respondents** designed to convince the construction industry and – significantly, its standard-setting bodies – that the use of PB pipes and acetal fittings in plumbing systems would be suitable for those systems and that they were superior to, and less expensive than, copper pipes, the use of which then dominated the market. (App. 55a) The scheme was a fraud on the market. (App. 55a) **Respondents** marketed PB pipes and acetal fittings across the country to code bodies, builders, developers, plumbing distributors, and other users of plumbing parts. (App. 52a, 57a-58a) Their [**the Respondents'**] objective was to create an enormous demand for PB pipe and acetal fittings by making them "the material of choice" instead of copper for residential and commercial plumbing systems. (App. 57a). Among other things, the **Respondents** represented that PB pipes and acetal fittings: (1) were suitable for use in a potable water plumbing system; (2) would last at least 50 years; (3) would not corrode and even the most aggressive water would not attack it; (4) was easy, reliable, simple, proven and fast to install; and (5) would not occasion serious service problems. (App. 59a-60a). In fact, scientists within the companies of the **Respondents** specifically advised their superiors that the PB and acetal resins were not suitable for water systems because they would degrade when exposed to chlorinated water.

> (App. 61a) Hope for increased profits by the marketing arms of the **Respondents** prevailed over these scientific objections. (*Id.*)

(emphasis added) [Petition at 4-5].

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT AMONG THE CIRCUITS

Notwithstanding Petitioners' arguments [Petition at 6-17], the Fifth Circuit's opinion does not conflict with any decision of this Court or of any other circuit on the same matter. To the contrary, every circuit court to have recently addressed the issue has held that detrimental reliance by the plaintiff is required to show proximate cause in Civil RICO actions involving mail or wire fraud.

A. The Second Circuit Requires Reliance

In *Metromedia Co. v. Fugazy*, the Second Circuit reiterated its requirement that "[i]n the context of an alleged RICO predicate act of mail fraud . . . the plaintiff [i]s required to demonstrate that the defendant's misrepresentations were relied upon." 983 F.2d 350, 368 (2nd Cir. 1992).[3] Attempting to avoid the clear holding of *Metromedia*, Petitioners argue that the decision in *County of*

[3] Petitioners attempt to limit the import of *Metromedia* by arguing that its application is limited to "simple, two-party misrepresentation cases." [Petition at 13]. Petitioners offer no support for this proposition, and none exists, as the *Metromedia* court did not qualify or limit its holding in any such manner. *See* 983 F.2d at 368.

Suffolk v. Long Island Co., 907 F.2d 1295 (2nd Cir. 1990), holds that such reliance by *third parties*, instead of plaintiffs, is sufficient under Civil RICO. However, *Suffolk* was decided before this Court's holding in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), and Petitioners' reliance on *Suffolk* is mistaken.

In *Suffolk*, ratepayers claimed that a group of utility defendants allegedly defrauded the New York State Public Service Commission ("PSC") into approving higher rates to consumers for its services. *See* 907 F.2d at 1299-1300. The Second Circuit affirmed the trial court's dismissal of plaintiffs' Civil RICO claims. *Id.* at 1312. In so ruling, the Second Circuit recognized that plaintiffs could not show reliance even by the PSC. Thus, the court had no reason to address the issue of reliance by the ratepayers. *See id.* at 1311-12. This ruling is precisely what *Holmes* requires.[4]

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[4] Petitioners also cite *Cement and Concrete Workers Dist. Council v. Lollo*, 148 F.3d 194 (2nd Cir. 1988) and *Standardbred Owners Ass'n v. Roosevelt Raceway*, 985 F.2d 102 (2nd Cir. 1993), as purported support for their alleged circuit conflict. [Petition at 13-14]. Neither case supports Petitioners' arguments. *Lollo* did not involve Civil RICO. *Standardbred Owners Ass'n* involved misrepresentations that plaintiffs received and relied upon. *See* 985 F.2d at 103. This holding is in complete harmony with the dictates of *Holmes*. Indeed, the Second Circuit recently acknowledged that *Standardbred Owners Ass'n* was based on plaintiffs' direct reliance on defendants' allegedly fraudulent statements. *See Laborers Local 17 v. Phillip Morris, Inc.*, 191 F.3d 229, 237-38 (2nd Cir. 1999).

B. The Third Circuit Requires Reliance

The Third Circuit likewise requires detrimental reliance in Civil RICO actions predicated on mail or wire fraud. In *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737 (3rd Cir. 1996), plaintiff sued several processed milk suppliers, alleging that they engaged in a scheme to overcharge plaintiff for dairy products in violation of Civil RICO based on mail and wire fraud. *Id.* at 741. Because, as in this case, plaintiff was unable to plead and prove that it detrimentally relied upon any of the alleged instances of mail and wire fraud, the district court dismissed the RICO claims. *Id.* On appeal, the Third Circuit held that plaintiff's failure to plead and prove detrimental reliance warranted dismissal of its RICO claims, and affirmed the decision of the district court. *Id.*[5]

In an attempt to avoid the holding in *Ideal*, Petitioners cite the pre-*Holmes* RICO decision in *Environmental Tectonics v. W.S. Kirkpatrick & Co., Inc.*, 847 F.2d 1052 (3rd Cir. 1988). *Environmental Tectonics*, however, has no application to this case, as it was a commercial bribery action. Given that bribery claims do not require reliance, the case unsurprisingly does not mention, much less consider, whether "reliance" is an aspect of proximate cause under Civil RICO. *See id.*

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[5] Attempting to blur the clear "reliance" holding of *Ideal*, Petitioners erroneously contend that its application is somehow limited to "two-party representation case[s]." [Petition at 9]. This contention is completely unsupportable, however, as the *Ideal* court made no such distinction and did not in any way limit its holding. *See* 90 F.3d at 737.

C. The Fourth Circuit Requires Reliance

Contrary to Petitioners' claim, the Fourth Circuit clearly holds that detrimental reliance is required to show proximate cause in a Civil RICO claim based on mail and wire fraud. For example, in *Brandenburg v. Seidel*, 859 F.2d 1179, 1188-90 (4th Cir. 1988), the court held that Civil RICO plaintiffs who base their claims on predicate acts of mail or wire fraud must allege both that they detrimentally relied on the fraudulent statements and that the fraudulent statements were the proximate cause of the alleged injury to their property or business. In cases decided since *Brandenburg*, the Fourth Circuit has uniformly required a showing of detrimental reliance in Civil RICO actions predicated on mail or wire fraud. *See Chisolm v. TranSouth Fin. Corp.*, 95 F.3d 331, 338-39 (4th Cir. 1996) (remanding to allow the plaintiffs to replead because they did not plead detrimental reliance); *Mid-Atlantic Telecom, Inc. v. Long Distance Servs., Inc.*, 18 F.3d 260, 264 (4th Cir. 1994) (remanding for, among other things, resolution of reliance issue); *Caviness v. Derand Res. Corp.*, 983 F.2d 1295 (4th Cir. 1993) (noting that a showing of reliance on the predicate act of fraud ensures the existence of a "direct relation between the injury asserted and the injurious conduct alleged."); *Lifschultz Fast Freight, Inc. v. Consolidated Freightways Corp.*, 805 F. Supp. 1277, 1291-92 (D.S.C.), *aff'd*, 998 F.2d 1009 (4th Cir. 1992) (proximate cause not established where "alleged predicate acts were all directed at third parties").

Notwithstanding the Fourth Circuit's clear and consistent mandates regarding reliance, Petitioners attempt to manufacture a conflict by contending erroneously that

Chisolm is in "flat contradiction" with *Summit*. [Petition at 15]. Petitioners are mistaken. Indeed, the Fourth Circuit's ruling on this point could not have been more clear, as the court expressly stated that "where fraud is alleged as a proximate cause of the injury, the fraud must be a 'classic' one. In other words, the plaintiff must have justifiably relied, to his detriment, on [the fraud]." *See Chisolm*, 95 F.3d at 337.

In *Chisolm*, plaintiffs alleged that defendants sent fraudulent documents through the mail, but failed to allege that they relied upon them to their detriment. *Id.* at 333. As such, the district court dismissed plaintiffs' RICO claims for failure to plead detrimental reliance. *Id.* On appeal, the Fourth Circuit reiterated its long-standing requirement that Civil RICO plaintiffs plead and prove detrimental reliance, stating:

> where the predicate act giving rise to civil liability under RICO was alleged to have been mail fraud, prospective plaintiffs must, in order to demonstrate standing to sue, plausibly allege both that they detrimentally relied in some way on the fraudulent mailing, [citations omitted] and that the mailing was a proximate cause of the alleged injury to their business or property.

Id. at 337. The court remanded the case with the instruction that the plaintiffs be given an opportunity to cure their reliance pleading "defect." *Id.* at 339. Upon remand, the plaintiffs amended their complaint and specifically pled detrimental reliance upon TranSouth's acts of mail fraud. *Chisolm v. TranSouth Fin. Corp.*, No. 97-1970, 1998 WL 709311, at *2 (4th Cir. Oct. 5, 1998) (unreported).

In short, *Chisolm* is entirely consistent with the instant action. Both cases held that pleading and proof of reliance were a necessary prerequisite to a claim under Civil RICO based on mail or wire fraud. The only difference is that in *Chisolm*, unlike here, plaintiffs alleged receipt and detrimental reliance upon the acts of mail fraud. *See Chisolm*, 95 F.3d at 334; *Chisolm*, No. 97-1970, 1998 WL 709311, at *2. In stark contrast, Petitioners here fully concede that they "did not rely on anything [Respondents allegedly] said or published in purchasing their properties." [Petition at 7a].

D. The Sixth Circuit Requires Reliance

As Petitioners concede, the Fifth and Sixth Circuits are consistent in requiring detrimental reliance in Civil RICO actions predicated on mail or wire fraud. [Petition at 24]. The Sixth Circuit's "reliance" requirement is exemplified by *Central Distributors of Beer, Inc. v. Conn*, wherein it affirmed the dismissal of Civil RICO claims based on mail and wire fraud because the plaintiff was unable to present evidence that it received and relied upon any misrepresentations or omissions of material facts from the defendants. *See* 5 F.3d 181, 184 (6th Cir. 1993) ("the defendant must make a false statement or omission of fact to the plaintiff to support a claim of wire fraud or mail fraud as a predicate act for a RICO claim."); *see also Kenty v. Bank One*, 92 F.3d 384, 390-91 (6th Cir. 1996) (affirming dismissal of Civil RICO claims based on mail fraud because plaintiffs were unable to state with particularity a misrepresentation made to them by the defendants).

E. The Seventh Circuit Requires Reliance

Petitioners also concede that the Fifth and Seventh Circuits are consistent in requiring detrimental reliance on alleged misrepresentations made the basis of a Civil RICO claim. [Petition at 23]. The Seventh Circuit's rulings on this issue are set forth clearly in *Reynolds v. East Dyer Development Company*, where it affirmed the dismissal of Civil RICO claims predicated on mail or wire fraud because plaintiffs were unable to demonstrate that they received and relied upon any alleged misrepresentations or omissions by the defendants. 882 F.2d 1249, 1254 (7th Cir. 1989).

F. The Eighth Circuit Requires Reliance

In *Appletree Square I, Ltd. Partnership v. W.R. Grace & Co.*, 29 F.3d 1283 (8th Cir. 1994), the Eighth Circuit confirmed that, to satisfy proximate cause, Civil RICO plaintiffs must plead and prove reliance upon the alleged predicate acts of mail or wire fraud. *See* 29 F.3d at 1286. The facts of *Appletree* are strikingly similar to the instant case, as *Appletree* also involved an unsuccessful attempt to transform a garden variety products liability claim into a Civil RICO action. *See id.* at 1284. There, plaintiff, an owner of an office building, instituted a Civil RICO action against a remote supplier of an asbestos fireproofing product, but never contended that it relied on any misstatements or misrepresentations of the defendants in

purchasing the building. *Id.*[6] The Eighth Circuit affirmed dismissal of the case, holding:

> Because Appletree has not produced any evidence to show it detrimentally relied on any of the alleged misrepresentations in its purchase of the building, it has failed to establish the existence of a genuine issue of material fact as to whether the alleged misrepresentations proximately caused its claimed injuries *and thus lacks standing to bring its civil RICO claims.*

29 F.3d at 1287 (emphasis added).

Petitioners label *Appletree* as an "anomaly," and proceed to discuss three other decisions which they contend are "more typical" examples of Eighth Circuit law on proximate cause under Civil RICO. [Petition at 10]. As shown below, however, none of those decisions are inconsistent with either *Appletree* or *Summit*.

Petitioners first rely upon *Atlas Pile Driving Co. v. DiCon Financial Co.*, a pre-*Holmes* decision which did not even address proximate causation under Civil RICO, but rather focuses on the statutory requirements for mail and wire fraud. 886 F.2d 986, 990-93 (8th Cir. 1989). Petitioners also rely upon *Bieter Co. v. Blomquist*, 987 F.2d 1319 (8th Cir. 1993); however, that case involved a bribery claim

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[6] Instead, the owner attempted (as do Petitioners in this case) to establish detrimental reliance through a "fraud-on-the-market" theory. *See id.* at 1286. The court rejected this contention, properly noting that the "fraud-on-the-market" theory of reliance has been reserved almost exclusively for securities fraud cases. *Id.*; *see also Summit*, 214 F.2d at 561 ("There is no pretense of such a market here and the fraud on the market doctrine is not applicable.").

and thus neither mentioned nor considered whether detrimental reliance upon predicate acts of mail or wire fraud is necessary to state a Civil RICO claim.

Petitioners' citation to *United HealthCare Corporation v. American Trade Insurance Co.*, 88 F.3d 563 (8th Cir. 1996), is similarly unavailing. *United HealthCare* did not address the question of whether detrimental reliance was required to prove proximate causation, instead it addressed the question of whether detrimental reliance was required to prove a violation of the mail or wire fraud statutes. Before holding that detrimental reliance was required to prove proximate causation, the *Summit* court addressed the same question as *United HealthCare*, and it stated:

> The question before us is whether a plaintiff's reliance on the predicate mail or wire fraud is necessary in order to establish proximate causation. In *Armco Industries Credit Corp. v. SLT Warehouse Co.*, this court distinguished mail fraud under RICO from common law fraud and stated that 'to find a *violation* of the federal mail fraud statute it is not necessary that the victim have detrimentally relied on the mailed misrepresentations.' Ours is a different question.

(emphasis in original) [Petition at 4a]. Consequently, the Petitioners' reliance on *United HealthCare* is misplaced.

G. The Ninth Circuit Requires Reliance

Although not addressed by Petitioners, the Ninth Circuit also requires reliance on alleged misrepresentations in Civil RICO cases based on mail and wire fraud. For example, in *Forsyth v. Humana, Inc.*, the Ninth Circuit

affirmed the dismissal of a Civil RICO action predicated on mail and wire fraud where plaintiffs were unable to establish that they relied on any specific misrepresentations regarding the calculation of insurance premiums by the defendants. *See* 114 F.3d 1467, 1481 (9th Cir. 1997); *see also MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504-05 (9th Cir. 1986) (holding that plaintiff's mail fraud and racketeering charges were "without foundation" because it could not state reliance).

H. The Tenth Circuit Requires Reliance

The Tenth Circuit, consistent with the instant case, also requires plaintiffs to plead detrimental reliance in order to state a Civil RICO claim based on mail and wire fraud, and Petitioners do not contend otherwise. Application of the Tenth Circuit's rule is found in *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, where the court held that plaintiff could not state a Civil RICO claim based on mail and wire fraud because it failed to plead detrimental reliance on any fraudulent misrepresentations. *See* 939 F.2d 887, 892 (10th Cir. 1991).

I. The Eleventh Circuit Requires Reliance

The Eleventh and Fifth Circuits are uniform with respect to their treatment of "proximate cause" in Civil RICO cases involving mail or wire fraud. For example, in *Pelletier v. Zweifel*, the Eleventh Circuit held that "when the alleged predicate act is mail or wire fraud, the plaintiff must have been a target of the scheme to defraud and must have relied to his detriment on misrepresentations

made in furtherance of that scheme." 921 F.2d 1465, 1499-1500 (11th Cir. 1991).

Since *Pelletier*, the Eleventh Circuit has consistently required such direct reliance, and also squarely held that alleged instances of mail and wire fraud directed to *third parties* are insufficient to satisfy RICO proximate cause. *See All Care Nursing Serv., Inc. v. High Tech Staffing Servs., Inc.*, 135 F.3d 740, 745 n.10 (11th Cir. 1998), *cert. denied*, 526 U.S. 1019 (1999) ("[r]eliance is only an element of a RICO claim to the extent that a RICO plaintiff must prove he was injured by the RICO defendant's deception and fraud."); *Johnson Enters. of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1318 (11th Cir. 1998) ("Because the misrepresentations the defendants are said to have made were directed to [third parties], not [the plaintiff], [plaintiff] lacks standing under section 1964(c) to prosecute a claim based on such misrepresentations.").[7]

The three cases cited by Petitioners do not create a conflict between *Pelletier* and its progeny. First, *Taffet v. Southern Co.*, which was decided before *Holmes*, has nothing to do with the issue in this case. That case involved ratepayers' claims that the defendants defrauded public utility commissions into approving elevated utility rates,

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[7] Petitioners try to circumvent the clear dictates of *Pelletier* by attempting to limit its holding to "simple, two-party misrepresentation cases." [Petition at 12]. However, Petitioners fail to cite the Court to any part of *Pelletier* imposing (or even mentioning) such a limitation, and the court did not limit or qualify its holding in any such manner. *See* 921 F.2d at 1499-1500. Additionally, as evidenced by the *Pelletier* court's 59 page decision, it was anything but a "simple, two-party misrepresentation" case. *See* 921 F.2d 1465.

which were then passed on to consumers. See 930 F.2d 847, 856 (11th Cir. 1991). Petitioners strangely fail to refer to the Eleventh Circuit's *en banc* decision in *Taffet*, 967 F.2d 1483 (11th Cir. 1992), but rather cite to an earlier, vacated decision of a three judge panel. [Petition at 11-12]. As the *en banc* decision made clear, *Taffet* did not address the proximate cause and reliance issues in this case. *See* 967 F.2d at 1494. Rather, on reconsideration, the Eleventh Circuit, reversing its earlier decision, held that the plaintiffs failed to allege a cognizable injury under Civil RICO due to application of the "filed rate doctrine." *See id.*

Petitioners also rely on *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386 (11th Cir. 1994), but that case involved a bribery claim, did not involve mail or wire fraud, and thus the court obviously did not consider "reliance" as an aspect of Civil RICO proximate cause. *See* 17 F.3d at 1398-1403. *Cox* did, however, cite approvingly to both *Pelletier* and *Brandenburg*, which, as discussed above, both hold that detrimental reliance is required in Civil RICO actions involving mail or wire fraud. *See* 17 F.3d at 1396, 1399. Petitioners additionally claim that the instant case conflicts with *All Care Nursing Serv., Inc.*, but that case reaffirmed the reliance holding set forth in *Pelletier*. *See* 135 F.3d at 745 n.10.

J. There Is No Conflict With The District of Columbia Circuit

Petitioners essentially concede that the District of Columbia Circuit has not yet decided the issue as to whether detrimental reliance upon predicate acts of mail

or wire fraud is necessary in Civil RICO cases. Nevertheless, Petitioners attempt to manufacture a conflict between the Fifth and District of Columbia Circuits by relying on *BCCI Holdings (Luxembourg), S.A. v. Khalil*, 214 F.3d 168 (D.C. Cir. 2000), which involved a scheme by several defendants to misappropriate almost four hundred million dollars from an international bank. 214 F.3d at 169-70. Petitioners' reliance on *BCCI* is misplaced, as that case did not involve detrimental reliance under Civil RICO in cases involving mail and wire fraud. *See id.* at 173-74.

II. THIS PETITION DOES NOT PRESENT AN "APT VEHICLE" FOR THIS COURT TO RESOLVE THE CONFLICT AMONG THE CIRCUITS

Petitioners assert that this Petition presents an apt vehicle for this Court to resolve the conflict among the circuits. Assuming *arguendo*, that a conflict does exist among the circuits, this Petition does not present an "apt vehicle" for this Court to resolve that conflict because, regardless of the outcome of this Petition: (A) the Petitioners, based on *Cleveland*, cannot state a valid Civil RICO claim, (B) the underlying dismissal order can be affirmed on other grounds, and (C) there is no adequate factual record upon which this Court could conduct its review.

A. Based on this Court's Recent Holding in *Cleveland*, the Petitioners Cannot State a Valid Civil RICO Claim

In *Cleveland*, Carl W. Cleveland assisted Fred Goodson in preparing a license application, as well as three renewal applications, for Truck Stop Gaming, Ltd. ("TSG") to operate video poker machines. (___ U.S. ___, 121 S.Ct., at 369) On each application, Messrs. Cleveland and Goodson named Mr. Goodson's adult children, Alex and Maria Goodson, as TSG's owners. *Id.* However, Messrs. Cleveland and Goodson were the true owners, but they could not identify themselves as the true owners because they had tax and financial problems which would render them "unsuitable" to receive a gaming license. *Id.* Therefore, without question, between 1992 and 1995, Messrs. Cleveland and Goodson mailed fraudulent applications to the State licensing agency. In 1996, Messrs. Cleveland and Goodson were charged with money laundering, racketeering and conspiracy. *Id.* Among the "predicate acts" allegedly supporting these charges were four counts of violating the federal mail fraud statute. *Id.*

Before trial, Mr. Cleveland filed a motion to dismiss based on the ground that the alleged fraud did not deprive the State of "property" under the federal mail fraud statute. *Id.* The District Court denied Mr. Cleveland's motion to dismiss, after which the jury convicted Mr. Cleveland on two counts of mail fraud, and on money laundering, racketeering, and conspiracy counts predicated on mail fraud. *Id.* The convictions were affirmed by

the Fifth Circuit Court of Appeals, *United States v. Bankston*, 182 F.3d 296, 309 (5th Cir. 1999), but were reversed by this Court. (___ U.S. ___, 121 S.Ct., at 370)

In reversing the convictions, this Court held that misrepresentations or omissions made to governmental bodies to obtain a license are not actionable under the federal mail fraud statute.

> This case presents the question of whether the federal mail fraud statute, 18 U.S.C. § 1341 reaches false statements made in application for a state license. . . . We conclude that ***permits of licenses of this order do not qualify as 'property' within 1341's compass***. It does not suffice, we clarify, that the object of the fraud may become property in the recipient's hands; for purposes of the mail fraud statute, ***the thing obtained must be property in the hands of the victim***.

(___ U.S. ___, 121 S.Ct., at 368) (emphasis added). Moreover, because there was no mail fraud, this Court held that the convictions based on the alleged "predicate acts" of mail fraud, *i.e.* racketeering, had to be reversed. (___ U.S. ___, 121 S.Ct., at 374-75)

The same situation is present here. The Petitioners' RICO claims are based on the predicate acts of mail and wire fraud. The alleged fraudulent communications, however, were made to governmental licensing bodies, i.e. the plumbing code bodies, for the purpose of obtaining a permit/license to use PB in a given locale. Therefore, the alleged fraudulent communications were not made to obtain "property" as required by the mail or wire fraud statutes. Moreover, because these Petitioners claim they

are the "victim," the allegedly fraudulent communications were not made to obtain "property in the hands of the victim."

Accordingly, under *Cleveland*, the fraudulent communications alleged by the Petitioners cannot be violations of the mail or wire fraud statutes. Since these allegedly fraudulent communications are not violations of the mail or wire fraud statutes, they cannot be used as "predicate acts" upon which to base a Civil RICO claim. Accordingly, based on this Court's recent decision in *Cleveland*, these Petitioners cannot assert a valid Civil RICO claim regardless of the outcome of this Petition.

B. The Underlying Dismissal Order Could Be Affirmed on Other Grounds

Regardless of the outcome of this Petition, the underlying dismissal order could be affirmed on any ground properly raised and presented in the trial court. *Esteves v. Brock*, 106 F.3d 674, 675 (5th Cir.), *cert. denied*, 522 U.S. 828 (1997). In the trial court, Household International asserted that Petitioners' Civil RICO claims should be dismissed because the Petitioners: (1) failed to state their claims with the specificity and particularity required, and (2) failed to allege that Household International committed any RICO violation, and therefore, the Petitioners had not, and could not, allege that their injuries were caused by Household International. [Household International Appendix at App. 36-43]. Accordingly, because the Petitioners have failed to state a valid Civil RICO claim, this Petition does not present an apt vehicle for this Court to resolve the alleged conflict among the circuits.

C. There Is No Adequate Factual Record Upon Which This Court Could Conduct its Review

Review pursuant to 28 U.S.C. § 1254 is discretionary. Consequently, this Court should choose the "best vehicle" when granting a Writ of Certiorari. To be the best vehicle, the Petition would have to be based on a contested factual record, one which had winnowed the facts from the bald assertions, only then could this Court conduct a full and fair review. This Petition is not based on an adequate factual record, instead this Petition is based solely on the Complaint and RICO Case Statement. Accordingly, this Petition is not the best vehicle, and in fact is not even an apt vehicle, for this Court to use in resolving the alleged conflict among the circuits.

CONCLUSION

Petitioners seek a Writ of Certiorari based on an alleged conflict among the circuits. However, every circuit court which has addressed the question of "Whether a Civil RICO plaintiff must plead and prove that he or she received, and detrimentally relied upon, the alleged mail or wire fraud in order to establish proximate causation between the alleged violation and injury?," has answered the question "YES." Accordingly, there is no conflict among the circuits and the Petition should be denied.

Moreover, even if there were a conflict among the circuits, the Petition should still be denied because: (A) per *Cleveland*, the Petitioners cannot state a valid Civil RICO claim, (B) the underlying dismissal order could be

affirmed on alternative grounds, and (C) there is no adequate factual record upon which this Court could conduct its review.

For these reasons, Respondent Household International, Inc. requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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App. 1

CASE NO. 99-20622

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUMMIT PROPERTIES, INC.; SUMMIT PROPERTIES LP; SUMMIT PROPERTIES PARTNERSHIP LP; STONY POINT/SUMMIT LP; McGREGOR/McGUIRE LP; HENDERSON/McGUIRE PARTNERS LP; OAK RIDGE/McGUIRE PARTNERS LP; WAVERLY PLACE/SUMMIT PARTNERS LP,

Plaintiffs/Appellants

v.

HOECHST CELANESE CORPORATION, formerly known as Celanese Corporation; HOECHST CORPORATION; E I DuPONT DE NEMOURS, AND CO.; SHELL OIL COMPANY, d/b/a Shell Chemical Company; VANGUARD PLASTICS, INC.; BOW INDUSTRIAL CORP.; HOUSEHOLD INTERNATIONAL, INC.,

Defendants/Appellees

On Appeal from the United States District Court for the Southern District of Texas-Houston Division
No. H-98-CV-1954

RESPONSE BRIEF OF APPELLEE HOUSEHOLD INTERNATIONAL, INC.

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CERTIFICATE OF INTERESTED PERSONS

Case No. 99-20622
SUMMIT PROPERTIES, INC.; SUMMIT PROPERTIES LP; SUMMIT PROPERTIES PARTNERSHIP LP; STONY POINT/SUMMIT LP; McGREGOR/McGUIRE LP; HENDERSON/McGUIRE PARTNERS LP; OAK RIDGE/McGUIRE PARTNERS LP; WAVERLY PLACE/SUMMIT PARTNERS LP,

Plaintiffs/Appellants

v.

HOECHST CELANESE CORPORATION, formerly known as Celanese Corporation; HOECHST CORPORATION; E I DuPONT DE NEMOURS AND CO.; SHELL OIL COMPANY, d/b/a Shell Chemical Company; VANGUARD PLASTICS, INC.; BOW INDUSTRIAL CORP.; HOUSEHOLD INTERNATIONAL, INC.,

Defendants/Appellees

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Summit Properties, Inc.:
Appellant

Summit Properties Limited Partnership:
Appellant

Summit Properties Partnership Limited Partnership:
Appellant

Stony Point/Summit Limited Partnership:
Appellant

McGregor/McGuire Limited Partnership:
Appellant

Henderson/McGuire Partners Limited Partnership:
Appellant

Oak Ridge/McGuire Partners Limited Partnership:
Appellant

Waverly Place/Summit Partners Limited Partnership:
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REQUEST FOR ORAL ARGUMENT

Household International, Inc. requests oral argument to resolve the issues presented in this case. The issues presented concern whether detrimental reliance is required to prove proximate cause in a civil RICO claim, and whether the District Court properly denied the Property Owners' Motion to Alter or Amend the Judgment and For Reconsideration Under Rule 59(e).

IDENTIFICATION OF PARTIES

Due to the number of Parties presented in this appeal, and for the convenience of the Court in reading the Response Brief, the Parties to this appeal will be identified as follows:

1. Summit Properties, Inc., Summit Properties Limited Partnership, Summit Properties Partnership

Limited Partnership, Stony Point/Summit Limited Partnership, McGregor/McGuire Limited Partnership, Henderson/McGuire Partners Limited Partnership, Oak Ridge/McGuire Partners Limited Partnership, and Waverly Place/Summit Partners Limited Partnership will be referred to collectively as the "Property Owners."

2. Hoechst Celanese Corporation f/k/a Celanese Corporation, Hoechst Corporation, E.I. Du Pont De Nemours & Company, Shell Oil Company d/b/a Shell Chemical Company, Vanguard Plastics, Inc., and Bow Industrial Corporation will be referred to collectively as the "Manufacturers."

3. Household International, Inc. will be referred to as "Household International."

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STATEMENT OF THE ISSUES

I. Did the District Court properly dismiss the Property Owners' civil RICO claims under Rule 12(b)(6) for failure to plead or prove detrimental reliance as proof of proximate cause as required by 18 U.S.C. § 1964(c), because the Property Owners admit that they did not detrimentally rely on the alleged fraudulent statements?

II. Did the District Court properly deny the Property Owners' Motion to Amend or Alter Judgment and For Reconsideration Under Rule 59(e) because the Property Owners failed to present any new or persuasive arguments in support of their motion?

CROSS-POINT

Should the District Court's dismissal be alternatively affirmed because the Property Owners failed to properly plead a RICO claim?

STATEMENT OF THE CASE

Household International agrees with the Property Owners' version of the Statement of the Case except in the following particulars:

1. Household International denies that it engaged in any conduct that (1) caused the Property Owners' alleged damages, (2) violated 18 U.S.C. § 1961 *et seq.* (Civil RICO), or (3) violated state common law.

2. Household International denies that there is any Fifth Circuit case holding that plaintiffs do not have to plead and prove detrimental reliance to establish proximate cause in a civil RICO case premised on allegations of mail and wire fraud.

3. Household International denies that the District Court's July 9, 1999 *Memorandum Opinion and Order* (*"July Reconsideration Order"*) is an Order dismissing the Property Owners' claims, and denies that the *July Reconsideration Order* is based on a finding that the Property Owners' alleged injuries were "indirect" or "too remote" to establish proximate cause. Instead, the District Court's *July Reconsideration Order* is merely an Order denying the Property Owners' Motion to Alter or Amend Judgment and For Reconsideration Under Rule 59(e) because they failed to present new or persuasive arguments in support of their Rule 59(e) motion.

STATEMENT OF THE FACTS

Although the Property Owners sued the Manufacturers and Household International claiming that they were damaged by polybutylene plumbing systems [R.

548-518, 914-885], ***the Property Owners never mention Household International in their Statement of Facts.*** [Appellants' Brief, pp. xviii-xxiv]. This is ***because Household International is unlike any other Appellee in this lawsuit.*** Household International has never designed, manufactured, or marketed any plumbing part or system. [R. 111]. Furthermore, Household International has never provided any raw material used in any plumbing part or system. [R. 111]. Indeed, Household International is merely a holding company whose only alleged connection to this lawsuit stems from its former ownership of a subsidiary company, Household Manufacturing, Inc.,[1] which in turn owned Hydrometals, Inc., which in turn owned United States Brass Corporation ("U.S. Brass"). [R. 87, 111]. Based solely on Household International's indirect ownership interest, the Property Owners have sued Household International for alleged violations of 18 U.S.C. § 1962 of the RICO Act. [R. 548-518, 914-885]. Household International, however, denies that it participated in any scheme to defraud, conspiracy, marketing effort or made any representations and/or omissions regarding polybutylene plumbing systems.

---

[1] A predecessor of U.S. Brass, Qest Products, Inc., began designing, manufacturing and/or marketing polybutylene plumbing systems in the mid- to late 1970s. Household International acquired U.S. Brass' owner, Wallace Murray Corporation, in 1981, and Wallace Murray changed its name to Household Manufacturing (now known as Eljer Manufacturing, Inc.). Household International owned Household Manufacturing for a brief period of time (February 20, 1981 to April 14, 1989).

SUMMARY OF THE ARGUMENT

ISSUE NUMBER 1

The District Court's dismissal of the Property Owners' civil RICO claims should be affirmed because the District Court, through Judge David Hittner, properly dismissed the claims under Rule 12(b)(6) because the Property Owners cannot plead or prove detrimental reliance as proof of proximate cause since the Property Owners admit that they did not detrimentally rely on the alleged fraudulent statements. District Courts in the Fifth Circuit, as well as other Circuits, require detrimental reliance to prove proximate cause for civil RICO claims based on mail and/or wire fraud. This requirement ensures the existence of a direct relationship between the injury asserted and the alleged conduct. Without precedent from this Court on this specific issue, Judge Hittner correctly relied on the holdings of a District Court within the Fifth Circuit, and on the reasoning and analysis of Circuit Courts that had "thoroughly and persuasively" addressed this issue. Moreover, the decisions Judge Hittner relied on are consistent with this Court's rulings in other civil RICO cases. Namely, requiring: a high standard of pleading and proof to support a civil RICO claim, that plaintiffs plead and prove both legal and proximate cause to support their injury, and that plaintiffs plead with specificity and particularity.

Because the Property Owners admit that they must prove proximate cause, but also admit that they did not detrimentally rely on the alleged fraudulent statements, the Property Owners argue that a generic "scheme to defraud" or "systemic reliance" should be sufficient to

prove proximate cause. However, no U.S. Supreme Court or Fifth Circuit case recognizes a general "scheme to defraud" or "systemic reliance" as an appropriate alternative to detrimental reliance as proof of proximate cause in a civil RICO case.

ISSUE NUMBER 2

The District Court properly denied the Property Owners' Motion to Amend or Alter the Judgement and For Reconsideration Under Rule 59(e) in the *July Reconsideration Order* because the Property Owners "failed to present new or persuasive arguments" to support their motion. [R. 1344]. Moreover, Judge Hittner did not rely on *Holmes* to dismiss the Property Owner's civil RICO claims because Judge Hittner had already dismissed the Property Owner's claims in a May 21, 1999 *Memorandum Opinion and Order*, and in a May 21, 1999 *Final Order of Dismissal* (collectively referred to as the *"May Dismissal Order"*), and because *Holmes* does not address detrimental reliance. [R.1243, 1242-1238].

CROSS-POINT

The dismissal should be alternatively affirmed because the Property Owners failed to plead their claims with the specificity and particularity required of civil RICO claims in the Fifth Circuit, and because they failed to plead that Household International committed a predicate act. The allegations in the Property Owners' Second Amended Complaint are based on alleged mail and wire fraud. Rule 9(b), *Federal Rules of Civil Procedure*, requires that all allegations of fraud be plead with particularity.

Moreover, the Fifth Circuit consistently requires that civil RICO allegations be plead with a high degree of specificity and in accordance with Rule 9(b). Because the Property Owners' complaint fails to plead their claims with the specificity and particularity required, and because they failed to plead that Household International committed a predicate act, the dismissal of their civil RICO claims should be affirmed.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISSED THE PROPERTY OWNERS' CIVIL RICO CLAIMS BECAUSE THE PROPERTY OWNERS ADMITTED THEY DID NOT RELY ON THE ALLEGED FRAUDULENT STATEMENTS, AND THUS THEY COULD NOT PLEAD AND PROVE DETRIMENTAL RELIANCE AS PROOF OF PROXIMATE CAUSE UNDER 18 U.S.C § 1964(C).

A. STANDARD OF REVIEW

This Court reviews *de novo* a district court's dismissal on the pleadings. *Morin v. Caire*, 77 F.3d 116, 120 (5th Cir. 1996). A dismissal is proper if the complaint lacks an allegation regarding a required element necessary to obtain relief. *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995). In addition, a dismissal is proper when no relief could be awarded under any set of facts that could be proven consistent with the allegations. *McConathy v. Dr. Pepper/Seven Up Corp.*, 131 F.3d 558, 561 (5th Cir. 1998). "[T]o avoid dismissal [under Rule 12(b)(6)], a plaintiff must plead specific facts, not mere conclusory allegations. . . . " *Guidry v. Bank of LaPlace*, 954 F.2d 278,

281 (5th Cir. 1992) (quoting *Elliot v. Foufas*, 867 F.2d 877, 881 (5th Cir. 1989)). It is not necessary or proper to assume that the plaintiffs can prove facts that they have not alleged. *Campbell v. Wells Fargo Bank, N.A.*, 781 F.2d 440, 442 (5th Cir.), *cert. denied*, 476 U.S. 1159 (1986).

B. THE PROPERTY OWNERS MUST PLEAD AND PROVE BOTH THE PREDICATE ACTS AND PROXIMATE CAUSE.

The Property Owners refuse to acknowledge the distinction between pleading and proving the predicate acts of mail and wire fraud and pleading and proving proximate cause. [R. 1345]. Instead, the Property Owners contend that, because detrimental reliance is not required to plead or prove a mail or wire fraud violation, detrimental reliance is also not required to plead or prove proximate cause in a civil RICO case. [Appellants' Brief, pp. 4-6]. However, merely proving mail and wire fraud does not also prove the proximate cause required for a civil RICO claim; each one has different elements. *See* 18 U.S.C. §§ 1341 and 1343; 18 U.S.C. § 1961 *et seq.*; *Brandenburg v. Seidel*, 859 F.2d 1179 (4th Cir. 1988); *Pelletier v. Zweifel*, 921 F.2d 1465, 1499 (11th Cir.), *cert. denied*, 502 U.S. 855 (1991); *Heden v. Hill*, 937 F.Supp. 1230 (S.D. Tex.1996).

Moreover, as Judge Hittner recognized, "[t]he clear language of the [RICO] statute imposes three separate requirements: (1) injury to the plaintiff's business or property; (2) proximate causation ("by reason of"); and (3) the underlying wrong (the predicate act or section 1962 violation)." [R. 1240]. However, the Property Owners admit that they "did not rely on anything said or

published in purchasing their properties." [R. 1198, 1241]. Therefore, even if the Property Owners could prove property damages and a mail and/or wire fraud violation (which Household International adamantly denies), they have only satisfied the first and third requirements of the RICO statute. The Property Owners must still satisfy the second requirement and prove proximate cause – which of course requires proof of detrimental reliance.

C. DISTRICT COURTS IN THE FIFTH CIRCUIT, AS WELL AS OTHER CIRCUIT COURTS, REQUIRE DETRIMENTAL RELIANCE TO PROVE PROXIMATE CAUSE IN CIVIL RICO CASES BASED ON MAIL AND WIRE FRAUD.

Contrary to the Property Owners' assertions, District Courts in the Fifth Circuit require proof of detrimental reliance to prove proximate cause in a civil RICO case based on mail and wire fraud. *See, Heden*, 937 F.Supp. at 1243-44 and *Brown v. Coleman Investments, Inc.*, 993 F.Supp. 416, 427 (M.D. La. 1998). In addition, other Circuits that have addressed this issue, including the Fourth and Eleventh Circuits, require detrimental reliance to prove proximate cause in a civil RICO case based on mail and/or wire fraud. Finally, although this Court has not specifically addressed this issue, other Fifth Circuit opinions discussing civil RICO claims are consistent with concluding that detrimental reliance is a necessary element to prove proximate cause.

1. DISTRICT COURT DECISIONS WITHIN THE FIFTH CIRCUIT HAVE REQUIRED DETRIMENTAL RELIANCE TO PROVE PROXIMATE CAUSE IN A CIVIL RICO CASE.

In *Heden*, the District Court for the Southern District of Texas held that:

> [u]nlike . . . criminal RICO prosecutions, civil RICO plaintiffs must allege and prove reliance in cases using the mail and wire fraud statutes as predicate offenses. *Id.* (citing *Pelletier* [ ], 921 F.2d [at] 1499 [ ]). Therefore, [a plaintiff] cannot maintain a civil RICO claim against [a defendant] absent evidence that [the defendant] made misrepresentations or omissions of material fact to [the plaintiff], through the use of the mails or wires, ***and evidence that [the plaintiff] relied on those misrepresentations or omissions to his detriment.*** (citations omitted).

Heden, 937 F.Supp. at 1243 (emphasis added). In that case, the *Heden* Court found that the defendants' communications were insufficient to establish civil RICO liability because those communications were made to a third-party and not to the plaintiff. *Id.*, at 1243. Likewise, the Property Owners admit that the alleged wrongful communications were made not to themselves, but to third parties, such as the "plumbing and construction industry," "builders," "developers," and "plumbing distributors." [R. 1198, 1241; Appellants' Brief, pp. xviii-xxiv]. The Property Owners also admit that they did not detrimentally rely on any alleged misrepresentation or omission by the Manufacturers. [R. 1198, 1241]. Nor can they prove detrimental reliance as to Household International

because no Property Owner has shown (nor can they show) that Household International made any misrepresentations or omissions to them. [R. 548-518, 914-885, 1198, 1241; Appellants Brief, pp. xviii-xxiv]. This fact is demonstrated by the Property Owners' complete omission of any reference to Household International in their Statement of Facts. [Appellants' Brief, pp. xviii-xxiv].

In addition to *Heden*, another District Court in this Circuit has held that when a plaintiff alleges mail and wire fraud as predicate acts under civil RICO, the plaintiff must comply with Rule 9(b), *Federal Rules of Civil Procedure*, and "particularly plead the following elements of fraud: '1) a misstatement or omission; 2) of material fact; 3) made with the intent to defraud; 4) ***on which the plaintiff relied***; and 5) which proximately caused the plaintiff's injury.' " *Brown*, 993 F.Supp. at 427 (referring to *Williams v. WMX Technologies, Inc.*, 112 F.3d 175, 177 (5th Cir.), *cert. denied*, 522 U.S. 966 (1997)) (emphasis added). In this case, however, the Property Owners have not pled, and cannot plead, detrimental reliance because they admit that they did not rely on the alleged fraudulent statements. [R. 1198, 1241].

Accordingly, because the Property Owners admit that they cannot plead or prove detrimental reliance as required by both *Heden* and *Brown*, the Property Owners' civil RICO claims do not meet the fundamental requirements laid out by District Courts in this Circuit. Therefore, the District Court's dismissal of the Property Owners' civil RICO claims should be affirmed.

2. CIRCUITS THAT HAVE ADDRESSED THIS ISSUE REQUIRE DETRIMENTAL RELIANCE TO PROVE PROXIMATE CAUSE IN A CIVIL RICO CASE.

Circuit courts deciding this issue require detrimental reliance to prove proximate cause. Specifically, the Second, Fourth, Sixth and Eleventh Circuits all require a civil RICO plaintiff to prove that he or she detrimentally relied on the defendant's alleged misrepresentations. *See, e.g., Metromedia Co. v. Fugazy*, 983 F.2d 350, 368 (2d Cir. 1992), *cert. denied*, 508 U.S. 952 (1993); *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1311 (2d Cir. 1990); *Chisolm v. TranSouth Fin. Corp.*, 95 F.3d 331, 337 (4th Cir. 1996); *Brandenburg*, 859 F.2d at 1188 fn. 10; *Central Distrib. of Beer, Inc. v. Conn*, 5 F.3d 181, 184 (6th Cir. 1993), *cert. denied*, 512 U.S. 1207 (1994); *Blount Fin. Servs., Inc. v. Walter E. Heller & Co.*, 819 F.2d 151, 152 (6th Cir. 1987); *Beck v. Prupis*, 162 F.3d 1090, 1097 (11th Cir. 1998), *cert. granted*, ___ U.S. ___ 1999 U.S. LEXIS 4001 (U.S. June 7, 1999) (No. 98-1480); *Pelletier*, 921 F.2d at 1499-1500. All of these courts recognize that "a showing of reliance on the predicate act of fraud ensures the existence of a 'direct relation between the injury asserted and the injurious conduct alleged,' " and that nothing less than detrimental reliance will prove the "direct relation." *Chisolm*, 95 F.3d at 337 (quoting *Holmes*, 503 U.S. at 268). Therefore, when Judge Hittner dismissed the Property Owners' civil RICO claims, he relied on *Brandenburg* and *Pelletier* because these courts had "thoroughly and persuasively addressed" the issue. [R. 1240]. *See, Brandenburg* and *Pelletier, supra.*

In *Brandenburg*, the Fourth Circuit explained the reasoning for requiring detrimental reliance to prove proximate cause in a civil RICO case:

> to find, or assume, that . . . acts of mail and wire fraud ha[ve] been shown does not also establish that its intended victims were injured, nor beyond that, that any injury suffered by them was sufficiently caused by the acts to create RICO liability. This follows because indictable acts of mail or wire fraud may be proven without any proof of detrimental reliance by, hence of injury to, the intended victims.

Brandenburg, 859 F.2d at 1187 (referencing *Armco Indus. Credit Corp. v. SLT Warehouse Co.*, 782 F.2d 475, 481-82 (5th Cir. 1986)). The Fourth Circuit recognized, therefore, that without detrimental reliance, plaintiffs could not prove that they were injured or that their injury was caused by the alleged fraud. Moreover, the *Brandenburg* Court recognized that this position was consistent with the language in the RICO Act and held that under civil RICO,

> a private plaintiff must demonstrate not only that the defendants have violated § 1962 [*i.e.*, the predicate act], but also that he has been "injured in his business or property by reason of [the alleged predicate act.]"

Brandenburg, 859 F.2d at 1187 (quoting 18 U.S.C. § 1964(c)). The *Brandenburg* Court interpreted this statutory language to mean that a civil RICO plaintiff must make "two closely related showings: (1) that he has suffered injury to his business or property; and (2) that this injury was caused by the predicate acts of racketeering

activity that make up the violation of § 1962." *Brandenburg*, 859 F.2d at 1187. The *Brandenburg* Court also referenced the well-recognized public policy reasons for requiring detrimental reliance to prove proximate cause in a civil RICO case. Specifically, that a defendant that commits a predicate act " 'is not liable for treble damages to everyone he might have injured by other conduct, nor is [he] liable to those who have not been injured.' " *Id.*, at 1187 (quoting *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 398 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985)).

In addition, the *Brandenburg* Court recognized that the U.S. Supreme Court had approached the issue of proximate cause from a slightly different perspective, but ultimately came to the same conclusion. Specifically, even though the Supreme Court considered the injury and causation requirements to be "aspects of standing, rather than elements of the civil RICO plaintiff's prima facie case," *Brandenburg*, 859 F.2d at 1187 (referencing *Sedima, SPRL v. Imrex Co., Inc.*, 473 U.S. 479, 496-97 (1985)), "it is clear that a civil RICO complaint is vulnerable to a motion to dismiss if it fails to allege . . . an adequate causal nexus between that injury and the [alleged] predicate acts of racketeering activity. . . . (Citations Omitted.)" *Brandenburg*, 859 F.2d at 1187. Indeed, the "adequate causal nexus" is proof of detrimental reliance. Judge Hittner relied on *Brandenburg* because it articulated the difference between proving a predicate act (i.e., the underlying act of mail or wire fraud) and proving proximate cause. [R. 1240]. That is, while "it is not necessary to establish detrimental reliance by the [plaintiff] in order to make out a violation of the federal mail fraud statute, see

Armco Indus., 782 F.2d at 481-82, ***such reliance is necessary to establish injury to business or property 'by reason of' a predicate act of mail fraud within the meaning of § 1964(c).***" *Brandenburg*, 859 F.2d at 1188 fn. 10 (emphasis added); [R. 1240-1239]. Therefore, because the Property Owners admit that they did not rely on the alleged fraudulent statements, the Property Owners cannot plead or prove detrimental reliance (and hence proximate cause). [R. 1198, 1241].

The Eleventh Circuit used similar reasoning to reach the same conclusion. *See, Pelletier, supra.* Relying on the Supreme Court's decision in *Sedima*, the *Pelletier* Court held that a private

> plaintiff cannot allege merely that an act of racketeering occurred and that he lost money [or property.] He must show a causal connection between his injury and a predicate act.

Pelletier, 921 F.2d at 1497. Likewise, the Property Owners admit they must show a causal connection (i.e., proximate cause) between their alleged injuries and the alleged mail and wire fraud. [Appellants' Brief, p. 3]. Moreover, the *Pelletier* Court, like the *Heden* Court, noted an important distinction between criminal and civil RICO claims based on mail and/or wire fraud. *Id.*, 921 F.2d at 1499. (Although the government prosecuting a defendant for mail or wire fraud "is not required to show that the intended victim was actually deceived and suffered injury. (Citations Omitted.) A civil RICO plaintiff must show . . . that he was injured by reason of the defendant's acts of deception.") Therefore, the *Pelletier* Court held that to properly plead and prove that an injury is proximately caused by reason of the mail or wire fraud "the

plaintiff must have been a target of the scheme to defraud ***and must have relied to his detriment on misrepresentations made in furtherance of that scheme.***" *Pelletier*, 921 F.2d at 1499-1500 (emphasis added). Finally, in the most recent Circuit court decision on this issue, the Eleventh Circuit re-affirmed its earlier position in *Pelletier* when it denied the plaintiffs' civil RICO claims based on alleged misrepresentations to third parties because the plaintiffs did not detrimentally rely on these allegations. *Johnson Enters. of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1318 (11th Cir. 1998) (citing *Pelletier*, 921 F.2d at 1499-1500.)

Therefore, like the District Courts in the Fifth Circuit, other Circuit Courts, including the Fourth and the Eleventh, require detrimental reliance to prove proximate cause in a civil RICO case based on mail and wire fraud. Because the Property Owners admit that they did not detrimentally rely on the alleged fraudulent statements [R. 1198, 1241], the Property Owners cannot prove proximate cause to support their civil RICO claims. Accordingly, the District Court's dismissal of the Property Owners' civil RICO claims should be affirmed.

3. THIS COURT HAS NOT ADDRESSED THIS SPECIFIC ISSUE.

Household International disagrees with the Property Owners' assertion that this Court has "well-settled jurisprudence" on this issue. [Appellants' Brief, p. 5]. Instead, Household International agrees with Judge Hittner that, while the *Armco* decision does not require proof of detrimental reliance to prove the underlying wrong (i.e., a

mail or wire fraud violation) (*Id.*, at 481-82), neither *Armco* nor the Fifth Circuit has addressed the issue of whether detrimental reliance is a necessary element of the proximate cause requirement under § 1964(c) of the RICO statute. [R. 1240].

In addition, although the Property Owners claim *Akin v. Q-L Investments, Inc.*, 959 F.2d 521 (5th Cir. 1992), *Laird v. Integrated Resources, Inc.*, 897 F.2d 826 (5th Cir. 1990), and *Abell v. Potomac Insurance Co.*, 858 F.2d 1104 (5th Cir. 1988), *vacated on other grounds*, 492 U.S. 914 (1989) are Fifth Circuit authority in accord with their understanding of *Armco*, [Appellants' Brief, p. 5], none of these cases address the issue of whether detrimental reliance is a necessary element of the proximate cause requirement under the RICO Act. (Judge Hittner's second requirement.) Rather, these cases, like *Armco*, merely hold that detrimental reliance is not necessary to plead and prove mail and/or wire fraud. (Judge Hittner's third requirement – the underlying wrong.) *See, Armco*, 782 F.2d at 481-82; *Akin*, 959 F.2d at 533; *Laird*, 897 F.2d at 839 fn. 53; and *Abell*, 858 F.2d at 1129.

Because this Court has not specifically addressed the issue of whether detrimental reliance is a necessary element of the proximate cause requirement in a civil RICO case based on mail and wire fraud, Judge Hittner correctly referred to and relied upon the reasoning and analysis of a District Court within this Circuit and of Circuit Courts that had decided this specific issue. Accordingly, the District Court's dismissal of the Property Owners' civil RICO claims should be affirmed.

4. THE DISTRICT COURT PROPERLY RELIED ON THE REASONING AND ANALYSIS OF A DISTRICT COURT WITHIN THE FIFTH CIRCUIT, AND IN THE FOURTH AND ELEVENTH CIRCUITS, BECAUSE THE REASONING AND ANALYSIS THEREIN IS CONSISTENT WITH THIS COURT'S RULINGS IN OTHER CIVIL RICO CASES.

Without specific precedent on this issue, Judge Hittner logically consulted Circuit court decisions that had "thoroughly and persuasively" addressed this issue, as well as a District Court decision within the Fifth Circuit. [R. 1240-1239]. *See Brandenburg, Pelletier,* and *Heden, supra.* From these decisions, Judge Hittner reasonably concluded that

> absent an allegation that [Household International] made material misrepresentations to [the Property *Owners] and that [the Property Owners] relied on the mail and wire fraud on which the Civil RICO claims are predicated, [the Property Owners] cannot satisfy the proximate causation requirement for purposes of Civil RICO.*

[R. 1239] (emphasis added). The reasoning and analysis Judge Hittner used is both logical and consistent with other Fifth Circuit decisions in civil RICO cases. Specifically, those decisions which require: a high standard of pleading and proof; that plaintiffs prove legal and proximate cause to support their injury; and specificity and particularity to sustain a claim. *See, Williams,* 112 F.3d at 177; *In re Burzynski,* 989 F.2d 733, 744 (5th Cir. 1993); *Tel-Phonic Services, Inc. v. TBS Intern., Inc.,* 975 F.2d 1134, 1138

(5th Cir. 1992); [R. 1240-1238; 1345-1344]. Accordingly, the District Court's dismissal of the Property Owners' civil RICO claims should be affirmed.

D. A GENERAL "SCHEME TO DEFRAUD" IS NOT A RECOGNIZED ALTERNATIVE FOR DETRIMENTAL RELIANCE AS PROOF OF PROXIMATE CAUSE IN A CIVIL RICO CASE BASED ON MAIL OR WIRE FRAUD IN ANY CONTROLLING JURISDICTION.

The Property Owners admit that they did not detrimentally rely on the alleged fraudulent statements. [R. 1198, 1241]. The Property Owners also admit that they must prove, *inter alia*, proximate cause to establish their civil RICO claims. [Appellants' Brief, p. 3]. Therefore, in a desperate attempt to establish proximate cause, and to save their civil RICO claims from dismissal, the Property Owners assert that the Manufacturers' engaged in a general "scheme to defraud" by "marketing [the polybutylene plumbing system] to the code bodies and the builders and plumbers, who worked on [the Property Owners'] properties, [and] that resulted in [the Property Owners'] injury." [Appellants' Brief, p. 6]. However, the *Heden* Court specifically held that

> ***"[a]lthough a general fraudulent scheme which incidentally affects a person may support other civil claims against the wrongdoer, the victim cannot assert a RICO claim absent evidence that the defendant made representations to the victim."***

Heden, 937 F.Supp. at 1244 (quoting *Central Distrib. of Beer*, 5 F.3d at 184) (emphasis added). In fact, no U.S. Supreme

Court or Fifth Circuit case has recognized a general "scheme to defraud" or "systemic reliance" as proof of proximate cause in a civil RICO case. [Appellants' Brief, pp 1-30].

As alleged support for their "general scheme to defraud"and "systemic reliance" argument, the Property Owners cite to numerous non-RICO cases involving the purchase and sale of stocks, bonds and other types of investment securities. [Appellants' Brief, pp. 6-9]. The only RICO case the Property Owners do cite is *Schacht v. Brown*, 711 F.2d 1343, 1352 (7th Cir. 1983), for the proposition that the RICO injury could "flow from [the] whole scheme." [Appellants' Brief, p. 7]. However, *Schacht* is easily distinguishable because it was not governed by the Fifth Circuit authority which requires pleading RICO and fraud claims with specificity and particularity in accordance with Rule 9(b) (see *Williams, Tel-Phonic* and *In re Burzynski*). Instead, the *Schacht* Court was "guided by . . . the 'liberal pleading policy of [Rule 8, *Federal Rules of Civil Procedure*, which] prevents dismissal of a meritorious action for purely formal or technical reasons. . . . ' " *Schacht*, 711 F.2d at 1352 (quoting *Murphy v. White Hen Pantry Co.*, 691 F.2d 350, 353 (7th Cir. 1982)). Because the *Schacht* decision is inconsistent with well-established Fifth Circuit authority, *Schacht* is not controlling in this case.

Finally, because the Property Owners lack supporting case law, they simply argue that such a general "scheme to defraud. . . . ***should be*** sufficient" to establish liability on the Manufacturers in a civil RICO case. [Appellants' Brief, p. 7] (emphasis added). However, the *Heden* Court has squarely addressed this proposal and determined that

a general scheme is insufficient to support a civil RICO claim "absent evidence that the defendants made representations to the victim." *Id.*, at 1244. This standard of course, requires a finding of detrimental reliance. Accordingly, the District Court's dismissal of the Property Owners' civil RICO claims should be affirmed.

II. THE DISTRICT COURT PROPERLY DENIED THE PROPERTY OWNERS' MOTION TO AMEND OR ALTER JUDGMENT AND FOR RECONSIDERATION UNDER RULE 59(E).

A. JUDGE HITTNER DID NOT BASE HIS DISMISSAL ON *HOLMES V. SECURITIES INVESTOR PROTECTION CORP*, 503 U.S. 258 (1992).

Incredibly, the Property Owners spend considerable time arguing an issue that was never raised or discussed by the District Court in its *May Dismissal Order* dismissing the Property Owner's claims. [Appellants' Brief, pp. 9-30]. Specifically, Judge Hittner did not "misread . . . *Holmes* . . . . [when he] dismiss[ed] [the Property Owners'] civil RICO [claims] . . . " [Appellants' Brief, p. 9]. In fact, Judge Hittner did not even cite *Holmes* in his *May Dismissal Order*. [R. 1242-1238]. Instead, Judge Hittner dismissed the Property Owners' civil RICO claims because:

> absent an allegation that [the Manufacturers and Household International] made material misrepresentations to [the Property Owners] and that [the Property Owners] relied on the mail and wire fraud on which the Civil RICO claims are predicated, [the Property Owners] cannot satisfy

> the proximate causation requirement for purposes of Civil RICO. As a result, [the Property Owners'] Civil RICO claim[s] must be dismissed.

[R. 1239].

B. *HOLMES* DOESN'T ADDRESS DETRIMENTAL RELIANCE

Judge Hittner did not base his dismissal of the Property Owners' civil RICO claims on *Holmes* because *Holmes* never addressed the issue of whether detrimental reliance is a necessary element of RICO's proximate cause requirement in a mail or wire fraud case. Rather, the question in *Holmes* was more general and centered on whether RICO's "by reason of" language included a proximate cause requirement. The Supreme Court answered that question in the affirmative. *Holmes*, 503 U.S. at 266 fn. 12 ("we hold . . . [that the 'by reason of' language of § 1964(c)] carries a proximate-cause requirement.") Thus, rather than undermining Judge Hittner's *May Dismissal Order*, *Holmes* actually supports Judge Hittner's holding that the civil RICO statute requires the Property Owners to prove proximate cause. [R. 1240] ("The clear language of the statute imposes . . . proximate causation. . . . ").

Furthermore, Judge Hittner did not need to rely on *Holmes* to dismiss the Property Owners' civil RICO claims because he had other authority directly on point. Judge Hittner specifically referred to, and specifically relied upon, *Heden*, *Brandenburg* and *Pelletier*. [R. 1242-1238; 1346-1344]. Each of these cases specifically addressed the issue before Judge Hittner, and each of these cases

squarely held that detrimental reliance is required to prove proximate cause. *Heden*, 937 F.Supp. at 1243; *Brandenburg*, 859 F.2d at 1188 fn. 10; *Pelletier*, 921 F.2d at 1499-1500. Notably, none of these decisions is predicated on *Holmes*. Therefore, Judge Hittner acted properly by basing his dismissal on *Heden*, *Brandenburg* and *Pelletier;* and by not basing his dismissal on *Holmes*. *Heden*, 937 F.Supp. at 1243; *Brandenburg*, 859 F.2d at 1188 fn. 10; *Pelletier*, 921 F.2d at 1499-1500. Accordingly, the District Court's dismissal of the Property Owners' civil RICO claims should be affirmed.

C. JUDGE HITTNER DENIED THE PROPERTY OWNERS' MOTION BECAUSE THEY FAILED TO PRESENT NEW OR PERSUASIVE ARGUMENTS IN SUPPORT OF THEIR MOTION.

In response to the dismissal, the Property Owners filed a Motion to Alter or Amend Judgment and for Reconsideration Under Rule 59(e) and a Supplement to the motion. [R. 1340; 1279-1266; 1315-1312]. However, as Judge Hittner noted, the purpose of Rule 59(e), *Federal Rules of Civil Procedure*, is to "correct manifest errors of law or fact or ~~to~~ present newly discovered evidence." *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990); [R. 1346]. Moreover, this motion is not the "proper vehicle for rehashing old arguments. . . . " *Resolution Trust Corp. v. Holmes*, 846 F.Supp. 1310, 1316 (S.D. Tex. 1994); [R. 1346]. Pursuant to this standard, Judge Hittner issued his *July Reconsideration Order* ***denying the Property Owners' Rule 59(e) motion because the Property Owners did not raise any new arguments.*** [R. 1346-1344]

(emphasis added). Indeed, the critical language in that *July Reconsideration Order* states:

> III. CONCLUSION AND ORDER
>
> Based on the foregoing, the Court concludes that [the Property Owners] have failed to present new or persuasive arguments in support of their Rule 59(e) Motion. The law regarding the necessary proof required of civil RICO plaintiffs is clear. [The Property Owners] are correct that reliance is not required to establish the predicate act element of civil RICO, if the predicate act is either mail fraud or wire fraud. [The Property Owners] must, however, satisfy the remaining elements of their civil RICO claim, including the proximate causation requirement. Accordingly, it is hereby
>
> ORDERED that [the Property Owners'] Motion to Alter or Amend Judgment and for Reconsideration Under Rule 59(e) (Instrument No. 121) is DENIED.

[R. 1344]. Nothing in this *July Reconsideration Order* suggests that Judge Hittner did anything other than deny the Property Owners' Rule 59(e) motion. [R. 1346-1344]. Clearly, Judge Hittner's *July Reconsideration Order* ***did not and could not*** dismiss the Property Owners' civil RICO claims because they had already been dismissed by his *May Dismissal Order*. [R. 1243, 1242-1238]. Accordingly, the District Court's denial of the Property Owners' Motion to Alter or Amend the Judgment and For Reconsideration Under Rule 59(e) should be affirmed.

CROSS-POINT

THE DISTRICT COURT'S DISMISSAL OF THE PROPERTY OWNERS' CIVIL RICO CLAIMS SHOULD BE ALTERNATIVELY AFFIRMED BECAUSE THE PROPERTY OWNERS FAILED TO PROPERLY PLEAD A RICO CLAIM.

A. STANDARD OF REVIEW

A dismissal is justified when the complaint fails to properly plead a civil RICO claim based on fraud. *Williams*, 112 F.3d at 180. (Court reversed district court's denial of motion to dismiss and remanded with instructions to dismiss because complaint failed to plead fraud claims with particularity required by Rule 9(b).) Moreover, a dismissal is proper if the plaintiffs have had two attempts to plead their claims. *Id.* Here, the Property Owners' Second Amended Complaint still did not plead their civil RICO claims with the specificity and particularity required, and still did not alleged that Household International had committed a predicate act. [R. 914-885]. Accordingly, the District Court's dismissal of the Property Owners' claims should be affirmed because, even after two attempts, the Property Owners have not properly plead a RICO claim.

B. THIS COURT MAY AFFIRM THE DISTRICT COURT'S DISMISSAL ON ALTERNATIVE GROUNDS.

In its *Motion to Dismiss*, its *Memorandum of Points and Authorities in Support of its Motion to Dismiss*, and its *Renewed Motion to Dismiss* Household International asserted that the Property Owners' civil RICO claims should be

dismissed because they "failed to satisfy the pleading requirements for claims brought under the RICO Act." [R. 76, 94 and 1039]. Specifically, Household International asserted that the Property Owners' civil RICO claims should be dismissed because they: (1) failed to state their claims with the specificity and particularity required, and (2) failed to allege that Household International committed any RICO violation, and therefore, they have not alleged, and cannot allege that their injuries were caused by Household International. [R. 76, 94 and 1039]. Although these arguments were properly raised and presented in the trial court, Judge Hittner did not rule upon these points in his *May Dismissal Order* dismissing the Property Owners' civil RICO claims [R. 1242-1238]. However, even though Judge Hittner did not rule upon these arguments when he dismissed the Property Owners' civil RICO claims, this Court may affirm Judge Hittner's dismissal on these alternative grounds. *See, Esteves v. Brock,* 106 F.3d 674, 676 (5th Cir.), *cert. denied,* 522 U.S. 828 (1997); *Brandenburg,* 859 F.2d at 1184.

C. THE PROPERTY OWNERS FAILED TO PLEAD WITH THE SPECIFICITY AND PARTICULARITY REQUIRED FOR FRAUD AND RICO CLAIMS.

The Property Owners' civil RICO claims against Household International are based on allegations of fraud. [Appellants' Brief, pp. xviii-xxiv; R. 905-897; 890-888]. Although the general pleading requirements under Rule 8(a), *Federal Rules of Civil Procedure,* allow "a short and plain statement of the grounds" alleged, it is well-recognized that the higher pleading burden of Rule

9(b) applies for fraud claims. *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1067, *reh'g denied*, 20 F.3d 1172 (5th Cir. 1994) (en banc); *see also* Fed. R. Civ. P. 9(b) ("In all averments of fraud . . . , the circumstances constituting fraud . . . shall be stated with particularity."). Moreover, claims under the RICO Act must be stated with a high degree of specificity because the Fifth Circuit applies Rule 9(b) to claims involving mail and/or wire fraud under the RICO Act. *Williams, Inc.*, 112 F.3d at 177; *Tel-Phonic Services, Inc.*, 975 F.2d at 1138; *Heden*, 937 F.Supp. at 1243-44. Accordingly, Rule 9(b) applies to the Property Owners' civil RICO claims based on mail and/or wire fraud and, therefore, the Property Owners' pleadings must satisfy both the RICO Act requirements, and the requirements of Rule 9(b), *Federal Rules of Civil Procedure*:

> Rule 9(b) requires particularity in pleading the "circumstances constituting fraud." This particularity requirement applies to the pleading of fraud as a predicate act in a RICO claim as well.

Tel-Phonic Services, Inc., 975 F.2d at 1138.

The Fifth Circuit is particularly strong in its insistence that RICO pleadings be precise and specific. In *In re Burzynski*, this Court commented on the dangers of permitting RICO claims to proceed without satisfying the particularity requirements:

> The difficulty is that the pleading the plaintiff relies on . . . is too general, speculative, and unsupported by facts. To permit it to serve the plaintiff's purposes would allow conclusory pleading to erode the substance of the "continuity," "enterprise," and "pattern" requirements.

Id., 989 F.2d at 744. Like the plaintiffs in *In re Burzynski*, the Property Owners only make conclusory allegations. [R. 890-885]. However, unlike well-pleaded allegations, conclusory allegations are not accepted as true when evaluating a Rule 12(b)(6) motion. *Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983). In short, the Property Owners' Second Amended Complaint provides none of the content required by Rule 9(b), *Federal Rules of Civil Procedure*, and the aforementioned case law. [Appellants' Brief, pp. xviii-xxiv; R. 905-897; 890-888].

Furthermore, this Court's opinion in *Williams* mandates the dismissal of the Property Owners' civil RICO claims against Household International. *Williams* first reaffirmed that Rule 9(b) applies to civil RICO claims based on fraud. *Id.*, at 177. *Williams* then defined "pleading fraud with particularity" for cases in the Fifth Circuit:

> [p]leading fraud with particularity . . . requires "time, place and contents of the false representations, as well as the identity of the person making the misrepresentation and what [that person] obtained thereby."

Williams, at 177 (quoting *Tuchman*, 14 F.3d at 1068). *Williams* additionally detailed why the plaintiffs' allegations of oral and written misrepresentations failed to meet the particularity pleading requirements of Rule 9(b). The complaint failed to sufficiently plead alleged oral misrepresentations when it failed to "state a place or time that these representations were made." *Id.*, at 178. In addition, the complaint failed to sufficiently plead the alleged written misrepresentations due to its lack of specificity.

"[Plaintiffs] lack of specificity as to which portion is false and why prevents this portion of the complaint from meeting the standard of pleading set out in Rule 9(b)." *Id.*, at 179. Similarly, in *Bonton v. Archer Chrysler Plymouth, Inc.*, 889 F.Supp. 995 (S.D. Tex. 1995), the District Court held that to satisfy Rule 9(b)'s pleading requirements for fraud allegations, "a plaintiff must ***at a minimum*** allege the 'time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby.' " *Bonton*, 889 F.Supp. at 1004 (quoting *Tel-Phonic Servs., Inc.*, 975 F.2d at 1139 (quoting 5 C. WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1297, at 590)) (emphasis added).

As in *Williams* and *Bonton*, the Property Owners have failed to plead their RICO claims with the specificity and particularity required by Rule 9(b). Specifically, their Second Amended Complaint does not sufficiently plead any misrepresentation or omission by Household International because they fail to allege (a) any misrepresentation or omission by Household International as opposed to some other separate and distinct corporate defendant; (b) the time, place, or contents of the alleged false representation; and (c) the identity of the person making the representation and what he or she obtained thereby. [Appellants' Brief, pp. xviii-xxiv; R. 905-897; 890-888]. Accordingly, the District Court's dismissal of the Property Owners' claims should be affirmed because the Property Owners failed to plead with the specificity and particularly required for fraud and RICO claims.

D. THE PROPERTY OWNERS' FAILED TO PLEAD THAT HOUSEHOLD INTERNATIONAL COMMITTED A PREDICATE ACT

In addition to the lack of specificity and particularity, the Property Owners have not alleged, and cannot allege, that Household International committed a single predicate act, much less the two minimum predicate acts required to create a "pattern" for civil RICO liability. [Appellants' Brief, pp. xviii-xxiv; R. 905-897; 890-888]. Although the Property Owners may have alleged that other Appellees committed two or more predicate acts, ***the Property Owners' claims against Household International must be judged solely on the allegations against Household International without regard to any allegations relating to other co-defendants.*** *See, e.g., McLaughlin v. Anderson,* 962 F.2d 187, 192 (2d Cir. 1992) ("the bare minimum of a RICO charge is that a defendant personally committed . . . the commission of two predicate acts."); *Banks v. Wolk,* 918 F.2d 418, 421 (3d Cir. 1990) ("We note that no defendant can be liable under RICO unless he participated in two or more predicate offenses sufficient to constitute a pattern.") *See also, Diaz v. Century Pacific Investment Corp.,* RICO Bus. Disp. Guide (CCH) ¶ 7,919 (C.D. Cal. Dec. 16, 1991); *Acebey v. Shearson Lehman Brothers, Inc.,* RICO Bus. Disp. Guide (CCH) ¶ 8,563 (C.D. Cal. June 4, 1994); *Merrill Lynch, Pierce, Fenner & Smith v. Young,* 1994 U.S. Dist. LEXIS 2929 (S.D.N.Y. Mar. 15, 1994); *Dooley v. United Technologies Corp.,* 1992 U.S. Dist. LEXIS 8653, *24 (D.D.C. June 17, 1992); and *McLoughlin v. Altman,* RICO Bus. Disp. Guide (CCH) ¶ 8,385 (S.D.N.Y. Sept. 12, 1993). The Property Owners' Second Amended Complaint, however, fails to allege the commission of

even a single predicate act by Household International. [Appellants' Brief, pp. xviii-xxiv; R. 905-897; 890-888].

The Property Owners also fail to allege, with any specificity or particularity, that anyone for whom Household International could be held accountable committed a predicate act. [Appellants' Brief, pp. xviii-xxiv; R. 905-897; 890-888]. Moreover, to the extent the Property Owners' civil RICO claims are based on alleged omissions by another company, the Property Owners fail to allege the time, place, content, and speaker for any alleged misrepresentation or misleading statement allegedly made by this other company. [Appellants' Brief, pp. xviii-xxiv; R. 905-897; 890-888].

Furthermore, the Property Owners fail to allege that Household International, or any other company, had a fiduciary duty to any person that required it to make disclosures that it allegedly failed to make. [Appellants' Brief, pp. xviii-xxiv; R. 905-897; 890-888]. Absent a fiduciary duty, a failure to disclose cannot constitute fraud. *See, e.g., Chiarella v. United States*, 445 U.S. 222, 227-28 (1980) ("At common law, misrepresentation made for the purpose of inducing reliance upon the false statement is fraudulent. But one who fails to disclose material information prior to the consummation of a transaction commits fraud only when he is under a duty to do so. And the duty to disclose arises when one party has information 'that the other [party] is entitled to know because of a fiduciary or other similar relation of trust and confidence between them.' "); *see also, Armco Indus.*, 782 F.2d at 485 (this Court notes that negative acquiescence with no duty to disclose is not fraudulent). Despite these requirements, the Property Owners never allege facts providing

any basis for inferring a duty to disclose by Household International. [Appellants' Brief, pp. xviii-xxiv; R. 905-897; 890-888]. Accordingly, the dismissal of the Property Owners' civil RICO claims should be affirmed because the Property Owners' Second Amended Complaint fails to allege a single predicate act by Household International and fails to allege that Household International had a duty to disclose to the Property Owners.

CONCLUSION

ISSUE NUMBER 1

For these reasons, Household International respectfully requests that this Court affirm the District Court's May 21, 1999 *Memorandum Opinion and Order* dismissing the Property Owners' civil RICO claims. Because the Property Owners' admit that they did not rely on the alleged fraudulent statements, and because District Courts in this circuit, as well as other Circuit courts, require detrimental reliance to prove proximate cause in a civil RICO claim based on mail and wire fraud, the District Court properly dismissed the Property Owner's claims.

ISSUE NUMBER 2

Household International also respectfully requests that this Court affirm the District Court's July 9, 1999 *Memorandum Opinion and Order* denying the Property Owners' Motion to Alter or Amend the Judgment and for Reconsideration under Rule 59(e) because the Property Owners did not raise any "new or persuasive" arguments in their motion.

CROSS-POINT

Finally, Household International also respectfully requests that, in the alternative, this Court affirm the District Court's May 21, 1999 *Memorandum Opinion and Order*, and the District Court's May 21, 1999 *Final Order of Dismissal*, dismissing the Property Owners' civil RICO claims because the Property Owners failed (1) to plead their claims with the specificity and particularity required for fraud and RICO claims and/or (2) to allege a single predicate act against Household International.

Household International also requests any other relief to which it may show itself to be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that two (2) true and correct paper copies of the above instrument, as well as one electronic form, have been served by certified mail, return receipt requested, on counsel for all parties identified on the attached Service List, on this the 30th day of September, 1999. This document also has been sent to the Clerk of the Fifth Circuit via Fed Ex Courier on this the 30th day of September, 1999.

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CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2.7(c), the undersigned certifies that this Response Brief complies with the type-volume limitations of 5th Cir. R. 32.2.7(b).

1. EXCLUSIVE OF THE EXEMPTED PORTIONS IN 5th Cir. R. 32.2.7.(b)(3), THE RESPONSE BRIEF CONTAINS:

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_____
Glen M. Boudreaux

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(4)

No. 00-606

IN THE
Supreme Court of the United States

SUMMIT PROPERTIES, INC., *et al.*,

Petitioners,

v.

CNA HOLDINGS, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS CNA HOLDINGS, INC. AND CELANESE AMERICAS CORPORATION

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QUESTION PRESENTED

Have Petitioners failed to plead "proximate cause" under 18 U.S.C. § 1964(c), as required by this Court in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), where Petitioners have admitted they cannot plead detrimental reliance on any alleged predicate acts of mail and wire fraud, and where Petitioners' alleged injuries are indirect, remote, derivative of alleged harm to third parties, and subject to numerous intervening causal factors?

STATEMENT PURSUANT TO RULE 29.6

Respondent CNA Holdings, Inc., formerly known as Hoechst Celanese Corporation, and Celanese Americas Corporation, formerly known as Hoechst Corporation, are both indirect, wholly owned subsidiaries of Celanese AG. Celanese AG is a publicly traded company.

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STATEMENT OF THE CASE

By this case, Petitioners seek to federalize state products liability law. Under the guise of civil RICO, Petitioners claim that end users of products who never heard or detrimentally relied upon alleged misrepresentations by remote, raw material suppliers may nevertheless bring federal racketeering claims seeking treble damages and attorneys' fees. The United States District Court for the Southern District of Texas and the United States Court of Appeals for the Fifth Circuit refused Petitioners' effort to "establish" this novel "federal products liability scheme," holding that Petitioners' claims fail wholly to satisfy the proximate cause requirements of civil RICO set forth by this Court in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992). [R. 1332-37]; *Summit Properties, Inc., et al. v. Hoechst Celanese Corp., et al.* ("*Summit*"), 214 F.3d 556, 557, 562 (5th Cir. 2000). Respondents respectfully urge the same result here.

Petitioners — owners of apartments and other types of multi-unit dwellings allegedly containing polybutylene (or PB) plumbing — seek damages from numerous Respondents, including CNA Holdings, Inc., formerly known as Hoechst Celanese Corporation, and Celanese Americas Corporation, formerly known as Hoechst Corporation (collectively "Celanese"), under various theories of liability, alleging that polybutylene plumbing is defective. [R. 914]. Petitioners did not bring suit against the builders or sellers of their properties. Rather, Petitioners sued only some of the manufacturers of the plumbing, and three raw material suppliers — Shell Oil Company d/b/a Shell Chemical Company ("Shell"), E.I. duPont de Nemours and Company, and Celanese — which provided resins used by others in the

manufacture of some of the components found in some types of polybutylene plumbing. [R. 912-13]. Celanese supplied a raw material, known as Celcon, which was used by certain manufacturers to fabricate insert fittings that join pieces of pipe in some types of polybutylene plumbing. [R. 908, 912-13].

In an effort to support a federal civil RICO claim, Petitioners allege that Respondent Shell organized the other Respondents into an enterprise, which, among other things, used the mail and wires to make material misrepresentations to unidentified "code bodies, builders, developers, and plumbers throughout the United States" regarding the suitability of polybutylene plumbing. [R. 889]. Petitioners do not, because they cannot, plead that they ever heard, saw, or otherwise received any of these alleged misrepresentations, much less relied on them to their detriment.

Respondents moved to dismiss Petitioners' claims on the grounds that, among other things, Petitioners could not plead detrimental reliance on the alleged misrepresentations, and thus could not satisfy the proximate cause requirements of civil RICO. [R. 1070, 1099, 1126, 1135, 1143, 1162, 1169]. In response, Petitioners argued that reliance was not required, and instead rested their claim essentially on a "fraud on the market" theory. [R. 1996-98].

The district court granted Respondents' motions, dismissing Petitioners' civil RICO claims against all Respondents with prejudice, and dismissing Petitioners' pendent state law claims against all Respondents without prejudice. [R. 1332, 1337]. In so ruling, the District Court held that "absent an allegation that Defendants made material

misrepresentations to Plaintiffs and that Plaintiffs relied on the mail and wire fraud on which the civil RICO claims are predicated, Plaintiffs cannot satisfy the proximate causation requirement for purposes of civil RICO." [R. 1334].

The Fifth Circuit affirmed the dismissal of Petitioners' civil RICO claims, holding that Petitioners failed to plead "proximate cause" under civil RICO as required by this Court in *Holmes*. *See Summit*, 214 F.3d at 557-58. Rejecting the same "fraud on the market" theory Petitioners urge to this Court, the Fifth Circuit held that where, as here, "civil RICO damages are sought for injuries resulting from fraud, a general requirement of reliance by the plaintiff is a commonsense liability limitation." *Id.* at 562. Because Petitioners conceded that they "did not detrimentally rely on any of the [Respondents'] allegedly fraudulent misrepresentations that served as the basis for the RICO claims," the Fifth Circuit ruled that the claims were properly dismissed. *Id.* at 558, 562.

REASONS FOR DENYING THE WRIT

I. THE FIFTH CIRCUIT CORRECTLY HELD THAT PETITIONERS HAVE FAILED TO PLEAD PROXIMATE CAUSE UNDER CIVIL RICO

To state a civil RICO claim under Section 1964(c), Title 18, United States Code, plaintiffs must plead that they have been injured in their business or property "by reason of" the alleged predicate act. *See* 18 U.S.C. § 1964(c); *see also Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 (1985); *Summit*, 214 F.3d at 559. To satisfy the "by reason of" requirement, this Court held in *Holmes* that civil RICO plaintiffs must plead (and ultimately prove) proximate

causation, *i.e.*, that they were the "directly" injured parties. *See* 503 U.S. at 268. This proximate cause requirement establishes a legal limit on a person's responsibility, even for alleged wrongful conduct. *See id.* at 268.

Following the proximate cause holding of this Court in *Holmes* and the holdings of every other circuit court to have addressed the issue, the Fifth Circuit ruled that where, as here, civil RICO damages are sought for alleged injuries resulting from mail or wire fraud, a showing of reliance by the plaintiff is a "commonsense liability limitation." *Summit*, 214 F.3d at 562. Given that Petitioners admitted they could not make such a showing, the Fifth Circuit affirmed dismissal of Petitioners' claims. *Id.* at 562.

Contrary to Petitioners' claims, the Fifth Circuit's ruling is fully consistent with this Court's ruling in *Holmes*, including the three factors outlined in that case for determining whether civil RICO plaintiffs have pled properly a direct injury, and thus stated proximate cause: (1) the directness of the purported injury; (2) the difficulty of apportioning treble damages among other potential plaintiffs; and (3) the possibility of other plaintiffs vindicating the goals of civil RICO. *See* 503 U.S. at 269-71; *see also Callahan v. A.E.V., Inc.*, 182 F.3d 237, 264 (3d Cir. 1999) (listing factors). As shown below, Petitioners' indirect and remote civil RICO claims fail at each level of the *Holmes* analysis. *See Holmes*, 503 U.S. at 269-70.

A. Petitioners Here Are Not The Directly Injured Parties

Petitioners' civil RICO claims fail the "directness" factor of *Holmes* for at least two reasons. First, the claims are indirect and remote, as they rest entirely on purported

misrepresentations to third parties many steps removed from Petitioners and their alleged injuries. Second, numerous causes intervene between Respondents' alleged misrepresentations and Petitioners' purported injuries.

1. Petitioners' claims are not direct

As Justice Holmes observed in *Southern Pac. Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918), "[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step." For that reason, this Court has held that injuries merely derivative of harm to a third party, such as those alleged here, are too indirect and remote to state a civil RICO claim. *Holmes*, 503 U.S. at 268-69 ("Thus, a plaintiff who complain[s] of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts [is] generally said to stand at too remote a distance to recover.") (citing 1 J.G. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES 55-56 (1883)). Following this Court's rulings, courts have routinely rejected indirect and remote claims under civil RICO, such as those asserted here. *See, e.g.*, *Steamfitters Local Union v. Phillip Morris, Inc.*, 171 F.3d 912, 921 (3d Cir. 1999), *cert. denied*, 120 S. Ct. 844 (2000) (healthcare funds' civil RICO claims too indirect and remote to recover for alleged harm to smokers); *Laborers Local 17 v. Phillip Morris, Inc.*, 191 F.3d 229, 239 (2d Cir. 1999), *cert. denied*, 120 S. Ct. 799 (2000) (healthcare funds' civil RICO claims for injuries (payment of medical benefits) flowing from tobacco companies' alleged fraudulent misrepresentations to individual smokers held too remote); *Callahan*, 182 F.3d at 264 (local beer distributorships' complaint of competitive disadvantage resulting from defendants' misrepresentations to the Pennsylvania Liquor Control Board held too remote under civil RICO);

Bivens Gardens Office Bldg. v. Barnett Banks, 140 F.3d 898, 906 (11th Cir. 1998) (losses suffered by company's stakeholders as a result of racketeering activity against the company held too remote under civil RICO); *National Enters., Inc. v. Mellon Fin. Servs. Corp.*, 847 F.2d 251, 254 (5th Cir. 1988) ("In a RICO case an indirectly injured party should look to the recovery of the directly injured party, not to the wrongdoer for relief.") (citation omitted); *Dow Chem. Co. v. Exxon Corp.*, 30 F. Supp. 2d 673, 696 (D. Del. 1998) (plaintiff's claims of injury flowing from defendants' fraudulent misrepresentations to the Patent and Trademark Office held too remote under civil RICO).

Petitioners here admit that all of the alleged misrepresentations were made not to them, but to third parties, *i.e.*, code bodies, developers, builders, and plumbers. [R. 889]. Petitioners further admit that they never heard, read, or otherwise received, much less relied to their detriment upon, these alleged misrepresentations. *See Summit*, 214 F.3d at 560 n.15. In so doing, Petitioners concede that they cannot establish that they were the directly injured parties, as the law requires. Based on these admissions, the Fifth Circuit in *Summit* rejected Petitioners' civil RICO claims as too indirect and remote to satisfy the proximate cause requirements of *Holmes*. *See* 214 F.3d at 557-59, 562; *see also Holmes*, 503 U.S. at 268 ("Allowing suits by those injured only indirectly would open the door to 'massive and complex damages litigation[, which would] not only burde[n] the courts, but [would] also undermin[e] the effectiveness of treble damages suits.' ") (quoting *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 545 (1983)); *Laborers Local 17*, 191 F.3d at 235 ("[*Holmes*] tells us that to plead a direct injury is a key element for establishing proximate cause. . . . Thus the other traditional rules [of proximate cause] are

additional elements, not substitutes for alleging (and ultimately, showing) a direct injury.").

2. There are numerous intervening causes between the alleged misrepresentations and the purported damages

In *Holmes*, this Court ruled that proximate cause cannot be properly pled where, as here, numerous intervening acts and decisions of third parties occurred between the alleged actions of Respondents and Petitioners' purported injuries: "the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation as distinct from other, independent factors." *See* 503 U.S. at 269. Based on this holding, courts consistently have dismissed civil RICO claims where numerous causal factors intervene between the alleged harm and the purported damages. *See, e.g.*, *Steamfitters Local Union*, 171 F.3d at 933 (holding healthcare funds' RICO claims too remote where district court would have to determine extent to which several possible intervening causes affected the funds' damages); *Callahan*, 182 F.3d at 264 (holding existence of numerous possible intervening causes rendered plaintiffs' RICO claims too remote); *Laborers Local 17*, 191 F.3d at 240 ("it becomes difficult to distinguish among the multitude of factors that might have affected the damages."); *Imagineering, Inc. v. Kiewit Pac. Co.*, 976 F.2d 1303, 1312 (9th Cir. 1992) (finding no "direct relationship" between defendants' conduit scheme and plaintiffs' failure to earn certain profits on subcontracts because intervening inability of prime contractors to secure the contracts was direct cause of plaintiffs' injuries).

Here, as Petitioners all but concede, there are numerous intervening events between the alleged misrepresentations by Respondents to third parties and Petitioners' claimed injuries. For example, as for the code bodies, there are numerous intervening causal factors, such as independent investigations, inquiries, tests, and economic concerns, which may have influenced the decision to grant or not grant approval for polybutylene plumbing in a particular jurisdiction. Likewise, with respect to developers, builders, and plumbers, factors such as cost, product availability, ease of installation, and construction requirements may have influenced their purchasing decisions, wholly apart from the alleged misrepresentations by Respondents. In its ruling in this case, the Fifth Circuit recognized that such intervening factors jeopardized Petitioners' ability to establish even "but-for" causation. *See Summit*, 214 F.3d at 560 n.19 ("If the relevant decisionmakers knew the limitations of the product but would have bought it anyway because of its low price, for example, the fraud would not have been a 'but-for' cause of the plaintiffs' damages.").[1]

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1. The Texas Supreme Court decision in *Amstadt v. United States Brass Corporation*, 919 S.W.2d 644, 651 (Tex. 1996), a polybutylene plumbing case brought under the Texas Deceptive Trade Practices Act, illustrates the eroding effect that these intervening acts and decisions have on the chain of causation. There, property owners alleged, like here, that Shell and Celanese made misrepresentations to code bodies and builders, but the court rejected the claim that the alleged misrepresentations were necessarily the cause of the property owners' injuries, stating: "As was the case with Celanese, the facts do not support the conclusion that Shell's misrepresentations were made in connection with the relevant consumer transactions, the purchase of homes. . . . [A]ny information provided by Shell was subject to *independent evaluation by builder code officials and by homebuilders*." *Id.* (emphasis added).

B. Petitioners' Indirect And Remote Claims Fail Due To The Difficulty Of Apportioning Damages At Each Level Of Alleged Injury

Petitioners' indirect and remote civil RICO claims also fail the second factor of the *Holmes* analysis because of the overwhelming difficulty of apportioning damages among other potential plaintiffs in order to obviate the risk of multiple recoveries. *See Holmes*, 503 U.S. at 269. In the present case, each tier of the purchasing chain — including developers, builders, plumbers, and Petitioners — has duplicate claims to recover for the allegedly defective plumbing. The creation of formulas to allocate such losses among the various tiers of potential claims would be essentially impossible, and thus in conflict with the Court's holding in *Holmes*.

Contrary to Petitioners' arguments [Petition at 20], resolution of this factor does not turn on whether the developers, builders, plumbers, and others have brought or will bring suit to recover for these duplicative damages, but whether there is a possibility that they may bring suit. *See, e.g.*, *Callahan*, 182 F.3d at 265 ("We do not think the question [of] whether the defendants' fraud proximately caused the plaintiffs' injuries can turn on whether some other potential claimants have filed suit. . . . [As] we recognized in *Steamfitters*[,] the fact that smokers themselves could bring claims against the tobacco companies was relevant to determining proximate causation with respect to the funds, even though the smokers were in fact unlikely to bring claims on their own.") (citing 171 F.3d at 933); *Laborers Local 17*, 191 F.3d at 240 ("Other remote payors like the employers or health insurers with whom the Funds may contract might

bring suit. . . . Thus, a possibility of duplicative recoveries exists.").[2]

C. The Goals Of RICO Can Be Vindicated By More Direct Means Than By Allowing Petitioners' Remote Claims To Proceed

Petitioners' claims also fail the final factor under *Holmes* because the central focus of RICO — deterring unlawful conduct — can be vindicated by other, more direct means. *See Holmes*, 503 U.S. at 269-70. Specifically, Petitioners have pled that the alleged RICO fraud was directed not to them, but to unidentified developers, builders and plumbers. [R. 889]. Under *Holmes*, the goals of RICO can be vindicated, if at all, by those allegedly directly injured parties. *See Holmes*, 503 U.S. at 269-70; *see also Callahan*, 182 F.3d at 265 ("Where a more directly affected party is available to vindicate the public interest in enforcing the law, we have less need to stretch the limits of proximate causation in RICO cases.").

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2. Petitioners also argue that the single satisfaction rule would protect Celanese and the other Respondents against the possibility of duplicate recoveries. [Petition at 20 n.13]. However, this argument was specifically rejected by the Second Circuit in *Laborers Local 17*, because courts would still be forced to "adopt complicated rules apportioning damages" among the various entities. *See* 191 F.3d at 240 (quoting *Holmes*, 503 U.S. at 269); *see also Callahan*, 182 F.3d at 264 (holding that potential claims by plaintiffs and beer wholesalers for the same economic loss negated proximate cause); *Steamfitters Local Union*, 171 F.3d at 933 (finding lack of proximate cause because "a court adjudicating the Funds' RICO claims would need to consider the appropriate apportionment of damages between smokers and others such as the Funds who suffered economic losses as a result of the tobacco companies' alleged fraudulent acts.").

In response, Petitioners argue that most of these other parties — the developers, builders, and plumbers — are not likely to file suit. [Petition at 20]. However, Petitioners' argument misstates the issue:

> [The] circumstance [where the more directly injured parties have not brought suit] is irrelevant to determining whether the plaintiffs' injuries are too remote from the defendants' actions to be a proximate cause for the RICO claim. The post-injury actions of intervening parties cannot make the plaintiffs' losses more or less of a direct result of the defendants' actions. *The only question is whether these intervening parties are the ones that possibly could take steps to deter illegal activity as contemplated in Holmes.*

Callahan, 182 F.3d at 265 n.21 (emphasis added). Thus, that the allegedly directly injured parties (*e.g.*, code bodies, developers, builders, and plumbers) have not brought suit is immaterial to this analysis.

II. THE FIFTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR OF ANY OTHER UNITED STATES COURT OF APPEALS ON THE SAME MATTER

Notwithstanding Petitioners' arguments [Petition at 6-17], the Fifth Circuit's decision does not conflict with any decision of this Court or of any other circuit court on the same matter. To the contrary, as shown below, every circuit court to have recently addressed the issue has held that detrimental reliance by the plaintiff is required to show

proximate cause in civil RICO actions involving mail or wire fraud.

A. The Second Circuit Requires Reliance

In *Metromedia Co. v. Fugazy*, the Second Circuit held expressly that "in the context of an alleged RICO predicate act of mail fraud . . . [the] plaintiff is required to demonstrate that the defendant's misrepresentations were relied upon." 983 F.2d 350, 368 (1992).[3] Attempting to avoid the clear holding of *Metromedia Co.*, Petitioners argue that the pre-*Holmes* decision in *County of Suffolk v. Long Island Co.* ("*Suffolk*"), 907 F.2d 1295 (2d Cir. 1990), finds reliance by third parties, instead of plaintiffs, is sufficient under civil RICO. Petitioners are not correct, as *Suffolk* did not reach the issue of reliance by plaintiff in rejecting the civil RICO claims in that case.

In *Suffolk*, ratepayers claimed that a group of utility defendants defrauded the New York State Public Service Commission ("PSC") into approving higher rates. *See* 907 F.2d at 1299-1300. The Second Circuit affirmed the trial

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3. Petitioners attempt to limit the import of this decision, as well as two other decisions discussed *infra*, by arguing that their application is limited to "simple, two-party misrepresentation cases." [Petition at 9, 12, 13]. Contrary to Petitioners' argument, none of these cases so hold. To the contrary, all three cases stand clearly for the proposition that proximate cause under civil RICO based on fraud requires detrimental reliance. *See Metromedia Co.*, 983 F.2d at 368; *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 741 (3d Cir. 1996); *Pelletier v. Zweifel*, 921 F.2d 1465, 1499-1500 (11th Cir. 1991). Moreover, as evidenced by the 59 page decision in *Pelletier*, these decisions are anything but "simple, two-party misrepresentation" cases. *See* 921 F.2d 1465.

court's dismissal of plaintiff's civil RICO claims. *Id.* at 1312. In so ruling, the Second Circuit recognized that plaintiff could not even show reliance by the PSC, and thus had no reason to address the issue of reliance by the ratepayers. *See id.* at 1311-12.[4]

B. The Third Circuit Requires Reliance

The Third Circuit likewise requires detrimental reliance in civil RICO actions predicated on fraud to show proximate cause. For example, in *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.* ("*Ideal*"), plaintiff sued several processed milk suppliers, alleging that they engaged in a mail and wire fraud scheme to overcharge plaintiff for dairy products in violation of civil RICO. 90 F.3d 737, 741 (3d Cir. 1996). Because, as in this case, plaintiff was unable to plead and prove that it detrimentally relied upon any of the alleged instances of mail and wire fraud, the Third Circuit, affirming the district court's dismissal, held that plaintiff's failure to plead and prove detrimental reliance warranted dismissal of its RICO claims. *Id.*

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4. Petitioners also cite *Cement and Concrete Workers Dist. Council v. Lollo*, 148 F.3d 194 (2d Cir. 1988) and *Standardbred Owners Ass'n v. Roosevelt Raceway*, 985 F.2d 102 (2d Cir. 1993), as purported support for their alleged circuit conflict. [Petition at 13-14]. Neither case supports Petitioners. *Lollo* did not even involve civil RICO, and *Standardbred Owners Ass'n* involved misrepresentations that plaintiffs received and relied upon to their detriment. *See* 985 F.2d at 103. In *Standardbred Owners Ass'n*, plaintiffs purchased horse racing equipment and made other expenditures in reliance upon misrepresentations that defendants would continue to operate a horse racing track. *Id.* at 104-05. This holding is in complete harmony with the dictates of *Holmes*. Indeed, the Second Circuit recently acknowledged that the holding in *Standardbred Owners Ass'n* was based on plaintiffs' direct reliance on defendants allegedly fraudulent statements. *See Laborers Local 17*, 191 F.3d at 237-38.

In an attempt to avoid the holding in *Ideal*, Petitioners cite the pre-*Holmes* RICO decision in *Environmental Tectonics v. W.S. Kirkpatrick & Co., Inc.*, 847 F.2d 1052 (3d Cir. 1988). *Environmental Tectonics*, however, has no application to this case, as it was a commercial bribery action. Given that bribery claims do not require reliance, the case unsurprisingly does not mention, much less consider, whether "reliance" is a proximate cause requirement in civil RICO claims based on fraud. *See id.*

C. The Fourth Circuit Requires Reliance

Contrary to Petitioners' claim, the Fourth Circuit clearly holds that detrimental reliance is required to show proximate cause in a civil RICO action based on mail and wire fraud. For example, in *Brandenburg v. Seidel*, 859 F.2d 1179, 1188-90 (4th Cir. 1988), the court held that civil RICO plaintiffs who base their claims on predicate acts of mail or wire fraud must allege both that they detrimentally relied on the fraudulent statements and that the fraudulent statements were the proximate cause of the alleged injury to their property or business. In cases decided since *Brandenburg*, the Fourth Circuit has uniformly required a showing of detrimental reliance in civil RICO actions predicated on mail or wire fraud. *See Chisolm v. TranSouth Fin. Corp.*, 95 F.3d 331, 338-39 (4th Cir. 1996) (holding that plaintiffs failed to state proximate cause under civil RICO because they did not plead detrimental reliance); *Mid-Atlantic Telecom, Inc. v. Long Distance Servs., Inc.*, 18 F.3d 260, 264 (4th Cir. 1994) (remanding for, among other things, resolution of reliance issue); *Caviness v. Derand Res. Corp.*, 983 F.2d 1295, 1305 (4th Cir. 1993) (noting that a showing of reliance on the predicate act of fraud ensures the existence of a "direct relation between the injury asserted and the injurious conduct

alleged."); *Lifschultz Fast Freight, Inc. v. Consolidated Freightways Corp.*, 805 F. Supp. 1277, 1291-92 (D.S.C.), *aff'd*, 998 F.2d 1009 (4th Cir. 1992) (proximate cause not established where "alleged predicate acts were all directed at third parties").

Notwithstanding the Fourth Circuit's clear and consistent mandates regarding reliance, Petitioners attempt to manufacture a conflict by contending erroneously that *Chisolm* is in "flat contradiction" with *Summit*. [Petition at 16]. Petitioners are mistaken. Indeed, the Fourth Circuit's ruling on this point in *Chisolm* could not have been more clear, as the court expressly stated that "where fraud is alleged as a proximate cause of the injury, the fraud must be a 'classic' one. In other words, the plaintiff must have justifiably relied, to his detriment, on the fraud." 95 F.3d at 337.

In *Chisolm*, plaintiffs alleged that defendants sent fraudulent documents through the mail, but failed to allege that they relied upon them to their detriment. *Id.* at 333. As such, the district court dismissed plaintiffs' RICO claims for failure to plead detrimental reliance. *Id.* On appeal, the Fourth Circuit reiterated its long-standing requirement that civil RICO plaintiffs plead and prove detrimental reliance, stating:

> where the predicate act giving rise to civil liability under RICO was alleged to have been mail fraud, prospective plaintiffs must, in order to demonstrate standing to sue, allege both that they detrimentally relied in some way on the fraudulent mailing, and that the mailing was a proximate cause of the alleged injury to their business or property.

Id. at 337. The court remanded the case with instruction that the plaintiffs be given an opportunity to cure their reliance pleading "defect." *Id.* Upon remand, the plaintiffs amended their complaint and specifically pled detrimental reliance upon the alleged acts of mail fraud. *Chisolm v. TranSouth Fin. Corp.*, No. 97-1970, 1998 WL 709311, at *2 (4th Cir. Oct. 5, 1998) (unreported).

In short, *Chisolm* is entirely consistent with the instant action. Both cases held that pleading and proof of reliance were a necessary prerequisite to show proximate cause in a civil RICO claim based on fraud. The only difference is that in *Chisolm*, plaintiffs expressly alleged receipt of, and detrimental reliance upon, the acts of mail fraud. *See Chisolm*, 95 F.3d at 334; *Chisolm*, 1998 WL 709311, at *2. In stark contrast, Petitioners here concede that they "did not rely on anything [Respondents allegedly] said or published in purchasing their properties." [Petition at 7a].[5]

D. The Sixth Circuit Requires Reliance

As Petitioners concede, the Fifth and Sixth Circuits are consistent in requiring detrimental reliance to show

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5. Petitioners also cite *John C. Holland Enters., Inc. v. J.P. Mascaro & Sons, Inc.*, 653 F. Supp. 1242 (E.D. Va.), *aff'd*, 829 F.2d 1120, No. 87-2011, 1987 WL 38095, at *1 (4th Cir. 1987) (unreported), for the erroneous proposition that "the Fourth Circuit upheld a RICO claim . . . squarely in conflict with the Fifth Circuit's blanket rule." [Petition at 14]. In that case, however, the Fourth Circuit did not analyze, rule upon, or otherwise consider any RICO claims. *See John C. Holland Enters., Inc. v. J.P. Mascaro & Sons, Inc.*, 1987 WL 38095, at *1. Although the case initially involved a civil RICO claim, plaintiff "voluntarily dismissed" the claim before appeal to the Fourth Circuit. *Id.*

proximate causation in civil RICO actions predicated on mail or wire fraud. [Petition at 24]. The Sixth Circuit's "reliance" requirement is set forth clearly in *Central Distributors, Inc. v. Conn*, where the court affirmed the dismissal of civil RICO claims based on mail and wire fraud because the plaintiff was unable to present evidence that it received and relied upon any misrepresentations or omissions of material facts from the defendants. *See* 5 F.3d 181, 184 (6th Cir. 1993) ("the defendant must make a false statement or omission of fact to the plaintiff to support a claim of wire fraud or mail fraud as a predicate act for a RICO claim."); *see also Kenty v. Bank One*, 92 F.3d 384, 390-91 (6th Cir. 1996) (affirming dismissal of civil RICO claims based on mail fraud because plaintiffs were unable to state with particularity a misrepresentation made to them by the defendants).

E. The Seventh Circuit Requires Reliance

Petitioners also concede that the Fifth and Seventh Circuits are consistent in requiring detrimental reliance on alleged misrepresentations that are the basis of a civil RICO claim. [Petition at 23]. The Seventh Circuit's rulings on this issue are set forth unambiguously in *Reynolds v. East Dyer Development Company*, where it affirmed the dismissal of civil RICO claims predicated on mail or wire fraud because plaintiffs were unable to demonstrate that they received and relied upon any alleged misrepresentations or omissions by the defendants. 882 F.2d 1249, 1254 (7th Cir. 1989).

F. The Eighth Circuit Requires Reliance

In *Appletree Square Ltd. Partnership v. W.R. Grace & Co.* ("*Appletree*"), the Eighth Circuit confirmed that, to satisfy proximate cause, civil RICO plaintiffs must plead

and prove reliance upon alleged predicate acts of mail or wire fraud. 29 F.3d 1283 (8th Cir. 1994). The facts of *Appletree* are strikingly similar to the instant case, as *Appletree* also involved an attempt to transform a garden variety products liability claim into a civil RICO action. *See id.* at 1284. There, plaintiff, an owner of an office building, instituted a civil RICO action against a remote supplier of an asbestos fireproofing product, but plaintiff never contended that it relied on any misstatements or misrepresentations of the defendants in purchasing the building. *Id.*[6] The Eighth Circuit affirmed dismissal of the case, holding:

> Because Appletree has not produced any evidence to show it detrimentally relied on any of the alleged misrepresentations in its purchase of the building, it has failed to establish the existence of a genuine issue of material fact as to whether the alleged misrepresentations proximately caused its claimed injuries and thus lacks standing to bring its civil RICO claims.

29 F.3d at 1287.

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6. In *Appletree*, the owner attempted (as do Petitioners in this case) to establish detrimental reliance through a "fraud-on-the-market" theory. *See id.* at 1286. The court rejected this contention, properly noting that the "fraud-on-the-market" theory of reliance is reserved for securities fraud cases, and has no applicability to a product liability case. *Id.* The *Summit* court similarly rejected Petitioners' effort here to avoid dismissal by reference to this inapplicable doctrine, holding: "[n]o court has accepted the use of this theory outside of the context of securities fraud . . . ." 214 F.2d at 561.

Unable to distinguish *Appletree*, Petitioners label the decision an "anomaly," and proceed to discuss three other decisions which they contend are "more typical" examples of Eighth Circuit law on proximate cause under civil RICO. [Petition at 10]. As shown below, however, none of those decisions support Petitioners and none are inconsistent with either *Appletree* or *Summit*.

Petitioners first rely upon *Atlas Pile Driving Co. v. DiCon Financial Co.* ("*Atlas*"), a pre-*Holmes* decision which does not even address proximate causation under civil RICO. The *Atlas* decision does discuss the statutory requirements for criminal mail and wire fraud, but that issue is not relevant to this case. 886 F.2d 986, 990-93 (8th Cir. 1989). As the *Summit* court stated, the issue of the statutory requirements for mail or wire fraud are "distinct" from proximate cause requirements under civil RICO. *See* 214 F.3d at 559.

Similarly unavailing is Petitioners' citation to *United HealthCare Corporation v. American Trade Insurance Co.* ("*United HealthCare*"), 88 F.3d 563 (8th Cir. 1996). This case does not address reliance within the context of establishing proximate cause under civil RICO, and, as with *Atlas*, the discussion of whether reliance is a statutory requirement for criminal mail or wire fraud is not relevant to the issue of proximate cause.[7] Finally, it is clear from the facts in *United HealthCare* that the mail fraud alleged included the receipt of purportedly fraudulent insurance

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7. *See United HealthCare*, 88 F.3d at 571 n.5; *Summit*, 214 F.3d at 559 n.14 ("In Akin, however, this court noted only that reliance is not an element of an underlying mail or wire fraud violation. . . . Whether the plaintiff's damages were proximately caused by reason of such violation was not at issue.").

certificates mailed by defendants. *Id.* at 571. In *United HealthCare*, the defendants, insurance "purchase groups" and related entities, accepted premiums from various Health Maintenance Organizations ("HMOs"), but failed to forward the premiums to the insurance companies. *See id.* at 567. Instead, the defendants misappropriated the premiums and sent false insurance certificates to the HMOs, which would likely resolve the reliance issue. *Id.* at 567-68, 571.

Petitioners also rely upon *Bieter Company v. Blomquist*, 987 F.2d 1319 (8th Cir. 1993); however, that case involved a bribery claim and thus neither mentioned nor considered whether detrimental reliance upon predicate acts of mail or wire fraud is necessary to state a civil RICO claim.

G. The Ninth Circuit Requires Reliance

Although not addressed by Petitioners, the Ninth Circuit also requires reliance on alleged misrepresentations to state proximate cause in civil RICO cases based on mail and wire fraud. For example, in *Forsyth v. Humana, Inc.*, the Ninth Circuit affirmed the dismissal of a civil RICO action predicated on mail and wire fraud where plaintiffs were unable to establish that they relied on any specific misrepresentations regarding the calculation of insurance premiums by the defendants. *See* 114 F.3d 1467, 1481 (9th Cir. 1997); *see also MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504-05 (9th Cir. 1986) (holding that plaintiff's mail fraud and racketeering charges were "without foundation" because it could not state reliance).

H. The Tenth Circuit Requires Reliance

The Tenth Circuit, consistent with the instant case, also requires plaintiffs to plead detrimental reliance in order to

state a civil RICO claim based on mail and wire fraud, and Petitioners do not contend otherwise. Application of the Tenth Circuit's rule is found in *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, where the court held that plaintiff, a manufacturer of evaporative coolers, could not state a civil RICO claim based on mail and wire fraud because it failed to plead detrimental reliance on any fraudulent misrepresentations by the defendant, a competitor. *See* 939 F.2d 887, 892 (10th Cir. 1991).

I. The Eleventh Circuit Requires Reliance

The Eleventh and Fifth Circuits are wholly consistent with respect to "proximate cause" in civil RICO cases involving mail or wire fraud. For example, in *Pelletier v. Zweifel*, the Eleventh Circuit held that "when the alleged predicate act is mail or wire fraud, the plaintiff must have been a target of the scheme to defraud and must have relied to his detriment on misrepresentations made in furtherance of the scheme." 921 F.2d 1465, 1499-1500 (1991).

Since *Pelletier*, the Eleventh Circuit has routinely required reliance, and has also held that alleged instances of mail and wire fraud directed to third parties, such as those in the instant case, are insufficient to satisfy RICO proximate cause under civil RICO. *See All Care Nursing Serv., Inc. v. High Tech Staffing Servs., Inc.*, 135 F.3d 740, 745 n.10 (11th Cir. 1998), *cert. denied*, 526 U.S. 1019 (1999) (reliance required because a "RICO plaintiff must prove he was injured by the RICO defendant's deception and fraud."); *Johnson Enters. of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1318 (11th Cir. 1998) ("Because the misrepresentations the defendants are said to have made were directed to [third parties], not [the plaintiff], [plaintiff] lacks standing under

section 1964(c) to prosecute a claim based on such misrepresentations.").

Faced with this authority, Petitioners cite several cases which they claim conflict with *Pelletier* and its progeny [Petition at 11-12]. Petitioners are not correct. First, *Taffet v. Southern Co.*, which was decided before *Holmes*, has nothing to do with the issue in this case. That case involved ratepayers' claims that the defendants defrauded public utility commissions into approving elevated utility rates, which were then passed on to consumers. *See* 930 F.2d 847, 856 (11th Cir. 1991). Petitioners strangely fail to refer to the Eleventh Circuit's *en banc* decision in *Taffet*, 967 F.2d 1483 (11th Cir. 1992), but rather cite to an earlier, vacated decision of a three judge panel. [Petition at 11-12]. As the *en banc* decision made clear, however, *Taffet* did not address the proximate cause and reliance matters at issue in this case. *See* 967 F.2d at 1494. Rather, on reconsideration, the Eleventh Circuit, reversing its earlier decision, held that the plaintiffs failed to allege a cognizable injury under civil RICO due to application of the "filed rate doctrine," which has no application here. *See id.*

Petitioners also rely on *Cox v. Administrator U.S. Steel & Carnegie*, but that case involved a bribery claim, not mail or wire fraud claims, and thus the court did not consider "reliance" as a proximate cause requirement under civil RICO. *See* 17 F.3d 1386, 1398-1403 (11th Cir. 1994). *Cox* did, however, cite approvingly to both *Pelletier* and *Brandenburg*, which, as discussed above, both held that detrimental reliance is required in civil RICO actions involving mail or wire fraud. *See* 17 F.3d at 1396, 1399. Petitioners additionally claim that the instant case conflicts with *All Care Nursing Service, Inc.*, but that case reaffirmed

the reliance holding set forth in *Pelletier*. *See* 135 F.3d at 745 n.10.

J. There Is No Conflict With The District of Columbia Circuit

Petitioners essentially concede that the District of Columbia Circuit has not yet decided a case in which the issue was presented as to whether detrimental reliance upon predicate acts of mail or wire fraud is necessary to show proximate cause in civil RICO cases. Nevertheless, Petitioners attempt to manufacture a conflict between the Fifth and District of Columbia Circuits by relying on *BCCI Holdings (Luxembourg), S.A. v. Khalil* ("*BCCI*"), which involved a scheme by several defendants to misappropriate almost four hundred million dollars from an international bank. 214 F.3d 168, 169-70 (D.C. Cir. 2000). Petitioners' reliance on *BCCI* is misplaced, as that decision did not involve detrimental reliance under civil RICO in a case involving mail or wire fraud. *See id.* at 173-74.

CONCLUSION

Following the proximate cause requirements for civil RICO set forth by this Court in *Holmes*, circuit courts, including the Fifth Circuit in this case, have uniformly held that a plaintiff must plead and prove detrimental reliance on the alleged predicate acts of mail and wire fraud. Petitioners here admit they cannot plead or prove detrimental reliance on the alleged fraud. As such, the dismissal of their civil RICO claims was proper and should not be reviewed further. To hold otherwise would, as this Court recognized in *Holmes*, open the door to " 'massive and complex damages litigation[, which would] not only burde[n] the courts, but [would] also undermin[e] the effectiveness of treble damages suits.' " *See* 503 U.S. at 274 (citation omitted). For these reasons, Celanese respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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No. 00-606

In The Supreme Court of the United States

SUMMIT PROPERTIES, INC.; SUMMIT PROPERTIES, L.P.; SUMMIT PROPERTIES PARTNERSHIP, LP; STONY POINT/SUMMIT, L.P.; MACGREGOR/MCGUIRE, LP; HENDERSON/MCGUIRE PARTNERS, LP; OAK RIDGE/MCGUIRE PARTNERS, LP AND WAVERLY PLACE/SUMMIT PARTNERS, LP,

Petitioners,

v.

HOECHST-CELANESE CORPORATION f/k/a CELANESE CORPORATION; HOECHST CORPORATION; E. I. DUPONT DE NEMOURS & CO.; SHELL OIL COMPANY d/b/a SHELL CHEMICAL COMPANY; VANGUARD PLASTICS, INC.; BOW INDUSTRIAL CORP.; AND HOUSEHOLD INTERNATIONAL, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT THE DUPONT COMPANY'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the trial court properly dismiss Petitioners' civil RICO claim for failure to state a claim on which relief can be granted where Petitioners alleged predicate acts of mail fraud and wire fraud communicating allegedly fraudulent misrepresentations, but expressly disclaimed any reliance on such misrepresentations?

CORPORATE DISCLOSURE STATEMENT

E.I. DuPont de Nemours and Company is a publicly traded corporation listed on the New York Stock Exchange.

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Fed. R. Civ. P 59(e) 2

STATEMENT OF THE CASE

Petitioners brought this action in the United States District Court for the Southern District of Texas alleging violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961, *et seq.*, and state law claims for products liability. App. 66a-76a. Petitioners are owners of commercial and residential properties in which polybutylene plumbing systems were installed. App. 20a. Defendants are producers of raw materials used to make components of the polybutylene plumbing systems, or manufacturers of those components or systems. Defendant DuPont is the producer of a raw material, Delrin®, acetal resin used by others in the manufacture of insert fittings for polybutylene plumbing systems. App. 53a.

Petitioners alleged in their complaint that Shell Chemical Company organized various manufacturers of polybutylene plumbing systems and component parts into an "enterprise" to promote polybutylene plumbing systems, create an enormous demand for such systems, and cause polybutylene to become the material of choice for plumbing and potable water service distribution systems. App. 21a. Petitioners further alleged that, in furtherance of the enterprise's goal to promote polybutylene plumbing systems, the Defendants made material misrepresentations to building code entities, builders, and plumbers concerning the attributes of the systems. App. 21a-22a. Petitioners alleged that these material misrepresentations constituted mail fraud and wire fraud. App. 24a-25a.

Petitioners conceded that they did not rely on anything that the Defendants published or said in purchasing the properties equipped with polybutylene systems. Petitioners alleged that they did rely on local building inspection officials, who represented that the buildings that

they purchased conformed to applicable building codes. App. 22a.

Defendants filed motions to dismiss for failure to state a claim on which relief could be granted. The district court granted the motions. The court held that absent an allegation that Defendants made material representations and that Petitioners relied on the mail and wire fraud allegations that constituted the predicate acts for civil RICO, the Petitioners could not satisfy the proximate cause element to sustain a RICO claim. App. 25a. The court dismissed the civil RICO claim with prejudice and declined to exercise further jurisdiction over the state law claims, dismissing them without prejudice. App. 27a.

Petitioners filed a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e). App. 13a. The district court denied the motion. App. 15a. The court ruled that, while the Petitioners correctly argued that reliance was not a required element of the predicate acts of mail or wire fraud, Petitioners must still satisfy the remaining elements of their civil RICO claim, including proximate cause. App. 15a. Reliance on the alleged misrepresentations was required to show proximate cause. *Id.*

Petitioners appealed to the United States Court of Appeals for the Fifth Circuit. App. 17a. The Court of Appeals affirmed. Again on appeal Petitioners maintained that individual acts of reliance were simply unnecessary. App. 7a. The Court of Appeals reasoned that the Petitioners were conflating the causation element in a claim for fraud with the causation element in a claim for products liability. App. 8a. In a fraud claim, the causal element links the defendant's fraud to the plaintiff's injury. In products liability, the causal element links the product defect to the plaintiff's injury. *Id.*

> As a product travels in the stream of commerce, inherent defects are carried with it, but fraudulent statements are not. With the abolition of privity requirements, injuries produced by product defect may be actionable by all users including those remote in the distribution chain from a defendant manufacturer. The causal connection between a misrepresentation and a subsequent harm, however, vanishes once the product travels beyond the entity who actually relied on the representation when making a purchasing decision.

App. 8a. The Court reasoned that, even assuming reliance on the alleged misrepresentations by those to whom they were allegedly made – building code entities, builders and plumbers, such allegations do not tell whether the misrepresentations proximately caused Petitioners' injuries, for which product defects were clearly a producing cause. App. 9a. Given that Petitioners stipulated their lack of reliance, they came into possession of the allegedly defective systems without relying on the alleged misrepresentations. *Id.* Whether they received the systems from the manufacturers or prior property owners, any past fraud did not proximately cause Petitioners' injuries because there was no reliance. *Id.*

The Court of Appeals also rejected Petitioners' attempt to import the securities law constructive reliance theory of "fraud on the market". App. 11a. The Court observed that not only had no court accepted application of the theory outside the context of securities fraud, but also that the Eighth Circuit had rejected its use in a similar civil RICO case, *Appletree Square I, L.P. v. W.R. Grace & Co.*, 29 F.3d 1283, 1287 (8th Cir. 1994). The Court held that the

critical element of an efficient market acting as an intermediary was entirely absent. App. 11a-12a.

The Court concluded that the general requirement of reliance in a civil RICO case premised on alleged fraudulent misrepresentations was a common sense liability limitation. Otherwise, RICO's treble damages and attorney's fees provisions would "infiltrate garden variety products liability cases whenever marketing promotions touted the merits of the products, even if no plaintiff relied on those representations." App. 12a. The Court was not persuaded that Congress intended its use of the "by reason of" language in RICO to federalize state laws of products liability -- laws that have hardly proved to be anemic.

The Plaintiffs below then petitioned this Court for writ of certiorari.

REASONS THE PETITION SHOULD BE DENIED

I. Introduction and Summary of the Argument

The court below correctly diagnosed Petitioners' claim as an attempt to federalize the state law of products liability. Absent a requirement to show proximate cause by pleading and proving reliance, almost every products liability plaintiff could allege the elements of a claim for civil RICO where a product's virtues were publicized in advertising or warranties. The court below properly recognized that Petitioners sought a radical extension of civil RICO by conflating distinct duties and liability regimes. App. 2a.

RICO imposes liability when a plaintiff is injured by reason of the predicate acts. In *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268-70 (1992), the Court held that the "by reason of" language incorporated the traditional doctrine of proximate cause. Therefore, the RICO plaintiff has the burden to plead and prove injury proximately caused by predicate acts of the defendant. Here, the Petitioners contended, and still contend, as a matter of law, that no reliance on the predicate acts was required.

Petitioners argue that reliance is not necessary to establish proximate cause but, beyond the discredited "fraud on the market" argument, never articulate what takes the place of reliance to establish the required proximate cause on the facts of this case. Petitioners concede as they must that *Holmes* recognizes that RICO's "by reason of" language imports traditional notions of proximate cause. Both *Holmes*, 503 U.S. at 272 n.19, and the opinion below, App. 10a, recognize that there may be circumstances not present here, in which the casual link required might be satisfied by other facts. But in this case, the Petitioners relied on misrepresentations communicated by alleged mail and wire fraud as the predicate acts and specifically disclaimed any reliance on those acts.

Having failed below, Petitioners posit a conflict in the Circuits because such conflicts are a recognized rationale for the grant of the petition for certiorari. The flaw in Petitioners' argument is that the purported conflict has never been recognized by this Court or by the courts which handed down the supposedly conflicting decisions.

On the contrary, the courts of appeals have cited their own decisions and the decisions of other courts of appeals without ever observing that there is any conflict that requires distinguishing the decisions or the intervention of this Court to resolve. Reference to the cited decisions will show that

there is no conflict in the application of the RICO statute. The courts have applied a consistent construction of the statute, adhering to this Court's analysis in *Holmes*.

Moreover, where the predicate acts are alleged misrepresentations there is no substitute for reliance on the proximate cause element. Petitioners' attempt to find a distinction in the case law between "face to face" misrepresentation and "complex schemes to defraud" simply ignores real distinctions in the law. Not all the cases cited are misrepresentation cases, but in those that are, the courts have consistently required individual reliance. In contrast, Petitioners' "complex scheme to defraud", dispensing with any need for reliance, is more like the discredited notion of applying "fraud on the market" to products liability. *See* App. 11a.

The court below never claimed that it was imposing a "blanket rule." This is a term applied by Petitioners, *see, e.g.*, Petition, at 9, but never used by the court. The court held only that detrimental reliance was required "in cases such as this one." App. 8a. The court held that there must be some sufficiently direct causal linkage between the predicate act and the claimed injury, and in cases of alleged fraudulent misrepresentation, that causal linkage is detrimental reliance.

Petitioners' argument ignores the chain of causation in this case. The court below never contended, as Petitioners charge, that under no circumstances could a RICO case be maintained in the absence of direct misrepresentations. The court held only that, where reliance was specifically disclaimed, there could be no proximate causation between allegedly fraudulent statements and the failure of the product due to an alleged inherent defect.

II. There is No Conflict Between the Circuits on the Reliance Requirement in Civil RICO Misrepresentation Cases.

Petitioners never make the case, or even assert, that the decision below violates *Holmes*. Moreover, Petitioners' alleged "conflicts" melt away on close examination.[1] As *Holmes* noted, the courts of appeals have overwhelmingly held that proximate causation is required. 503 U.S. at 265 n. 11. Among the cases cited by the Court were *Pelletier v. Zweifel*, 921 F.2d 1465, 1499-1500 (11th Cir.), *cert. denied*, 502 U.S. 855 (1991); and *Brandenburg v. Seidel*, 859 F.2d 1179, 1189 (4th Cir. 1988).

A. The Second Circuit Requires Reliance.

Petitioners postulate a "conflict" in Second Circuit law by citing *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1311-12 (2d Cir. 1990). But Petitioners concede that *County of Suffolk* was properly relied upon by the court below. Petition, at 13. *County of Suffolk* involved allegations by plaintiff electric utility rate-payers that misrepresentations were made to the rate-setting commission that resulted in increased rates to utility customers, including plaintiffs. The court held that the evidence was insufficient to show the required casual connection between the rate-payers' alleged injury and alleged misrepresentations. 907 F.2d at 1312. Petitioners instead cite *County of Suffolk* for a proposition that the court did not hold. They assert that by not stating that it required misrepresentations be made directly to the rate-payers or that the rate-payers be the "target," the Second Circuit necessarily recognized that classic reliance was not required. In *County of Suffolk*, the court held that the district court properly granted judgment

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[1] Petitioners concede that they do not find the purported conflict in the decisions of the Sixth and Seventh Circuits. Petition, at 23-24.

n.o.v. where the plaintiffs were unable to show any reliance (and thus, any casual connection) between alleged misrepresentations to the commission setting rates and the commission's decision on those rates as it affected the rate-payer plaintiffs.

Any potential reliance in *County of Suffolk* is distinguishable from the facts here. Even if the Defendants made misrepresentations to building code entities, and the promulgating authorities relied on those representations in promulgating the codes, the resulting codes would only permit, not require, use of polybutylene plumbing. This alone, as the court below recognized, App. 9a, would not establish the required causal link for purchasers of buildings.

Similarly, *Standardbred Owners Ass'n v. Roosevelt Raceway Assocs., L.P.*, 985 F.2d 102 (2d Cir. 1993), does not articulate a different proximate cause standard. The court held that the district court erred in holding that the plaintiffs lacked standing to assert a civil RICO claim. 985 F.2d at 105. The court said that where plaintiffs contended that defendants made misrepresentations that induced the plaintiffs to take actions and make expenditures that would result in plaintiffs' financial injury, the district court erred in holding that the alleged RICO violation was too remote. *Id.* Thus the court held that there was direct reliance by plaintiffs on the representations of defendants, a fact specifically disclaimed in this case.

B. Petitioners' Alleged Conflict in the Third Circuit Does Not Involve a Misrepresentation Case.

To distinguish Third Circuit precedent supporting the court below, Petitioners concede that lack of reliance can establish lack of proximate cause in "a simple two-party misrepresentation case," but argue that a different rule outlined in "a complex multi-party scheme to defraud, requiring neither misrepresentation to, reliance by, inducement of nor target status of the plaintiff." This is so, Petitioners argue, because the proximate cause requirement under RICO is the same as the general antitrust proximate cause requirement.

First, *Holmes* itself rejects any necessary equivalence between antitrust and RICO. While recognizing the antitrust model for the RICO statute, 503 U.S. at 267, *Holmes* held that "antitrust injury", for example, has no analogue in the RICO setting, "and hence any related relaxation of proximate cause requirements is inapplicable". *Id.* at 259 n. 15 (citing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495-97 (1985).

Second, the case on which Petitioners rely, *Environmental Tectonics v. W.S. Kirpatrick, Inc.*, 847 F.2d 1052, 1055 (3d Cir. 1988), *aff'd on other grounds*, 493 U.S. 400 (1990), was a bribery case, not a misrepresentation case. *Id.* at 1067. The court below never asserted that its holding exhausted the universe of potential RICO fact patterns. *See* App. 10a. In fact, the district court clearly recognized that there were situations, not presented below, that would not be subject to the court's reliance analysis. Commercial bribery cases such as *Environmental Tectonics* are one of those types.

Environmental Tectonics was also decided four years before *Holmes*. Even if the court were applying the same

standard of proximate cause, there is no necessary inference that its analysis was fully informed by the principles of *Holmes*.

Petitioners concede, Petition at 9, that *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 746-47 (3d Cir. 1996), cited by the court below, App. 7a n.16, supports the reliance requirement.

C. The Fourth Circuit Has Consistently Followed the Reliance Requirement.

Petitioners also err when they argue that the decision below conflicts squarely with the Fourth Circuit's decision in *Chisholm v. TransSouth Fin. Corp.*, 95 F.3d 331, 337 (4th Cir. 1996). In fact, *Chisholm* was cited by the court below. App. 7a n.16. The Fourth Circuit held that the plaintiffs had relied on the apparent legitimacy and legality of the operation of a fraudulent activity. Thus, there was reliance. Here, it was conceded by plaintiffs that there was no reliance on the allegedly fraudulent communications. *See* App. 7a n.15.

Chisholm followed *Holmes* in its analysis, 95 F.3d at 336, holding that a RICO plaintiff must prove that the defendant's violation proximately caused the plaintiff's harm. *Id.* The *Chisholm* court noted that the Fourth Circuit had adhered to a consistent position on RICO proximate cause since its 1988 decision in *Brandenburg v. Seidel*, 859 F.2d 1179 (4th Cir. 1988). *Brandenburg v. Seidel* was cited in *Holmes* as an example of the courts of appeals' overwhelming authority requiring a demonstration of proximate cause for civil RICO cases. 503 U.S. at 266 n. 11. *Brandenburg* was also cited by the district court in holding that Petitioners failed to state a claim, as having "thoroughly and persuasively addressed" the proximate causation issue. App. 23a.

In *Brandenburg*, depositors at an insolvent Maryland savings and loan association brought civil RICO claims against former officers and directors of the insolvent Maryland Savings Share Insurance Corporation (MSSIC), a state-created quasi-public entity insuring savings and loan deposits. The plaintiffs alleged that promotional and advertising materials issued by the MSSIC and the defunct savings and loan persuaded them to deposit their funds, which were lost when the institution failed and the insurance corporation also failed. The court held that plaintiffs failed to allege a sufficient causal connection between their loans and the allegedly fraudulent promotion. While the representations may have been a cause in fact of the deposits and may have induced the deposits, the cause of the savings and loan's and the MSSIC's failure was the savings and loan's failure to maintain adequate reserves and MSSIC's inadequate oversight.

The court held that, when the predicate act giving rise to civil RICO liability is alleged to have been mail fraud, plaintiffs must plausibly allege both that they relied in some way on the fraudulent mailing and that the mailing was a proximate cause of the injury to their business or property. *Brandenburg*, 859 F.2d at 1188-90.

Despite the authority of *Brandenburg*, the *Chisholm* plaintiffs advanced the same argument that Petitioners advance here,

> that § 1964(c)'s "by reason of" language contemplates that a civil RICO suit may be maintained, not only in mail fraud cases where the deceitful mailing is the blade rushing down toward the guillotine victim, but also in cases involving more grandiose

> schemes to cheat, where the mailing is but part of the frame that holds the blade.

95 F.3d at 337 (footnote omitted). The court answered the plaintiffs as follows:

> We have never held otherwise. Inasmuch as an injury may have more than one proximate cause, our rule that reliance be shown in civil RICO fraud actions does not also dictate that the fraud be the sole legal cause of the plaintiff's injury, so long as it is a legal cause. The only caveat is that, where fraud is alleged as a proximate cause of the injury, the fraud must be a "classic" one. In other words, the plaintiff must have justifiably relied to his detriment on the defendant's material misrepresentations.

Id. The court affirmed dismissal of the complaint because the plaintiffs failed to plead actual reliance on the allegedly fraudulent mailings. *Accord Caviness v. DeRand Resources Corp.*, 983 F.2d 1295, (4th Cir. 1993) (plaintiffs who never read private placement memoranda could not show reliance required to establish proximate cause).

Thus the Fourth Circuit has consistently followed the same proximate cause analysis as the court below. *John C. Holland Enters., Inc. v. J.P. Mascaro & Sons, Inc.*, 653 F. Supp. 1242 (E.D.Va.), *aff'd*, 829 F.2d 1120 (4th Cir. 1987). That case was a district court decision opinion affirmed without published opinion, and thus cannot be used to raise a conflict with *Chisholm* or *Brandenburg*.

D. <u>There is No Conflict Between the Decision Below and the Law in the Eighth Circuit.</u>

Petitioners allege a conflict between the decision of the court below and the law of the Eighth Circuit, but concede, as they must, that *Appletree Square I, L.P. v. W.R. Grace & Co.*, 29 F.3d 1283, 1285-86 (8th Cir. 1994), cited by the court below, supports its decision. Petition, at 10. Petitioners attempt to distinguish *Appletree Square* by calling it "an anomaly." But *Appletree Square* is, in many respects, one of the most similar cases on its facts to the case here.

Appletree was a state law products liability and RICO claim brought by the owner of an office building for damages resulting from installation of a fireproofing product containing asbestos. 29 F.3d at 1284. The owner did not contend that the manufacturer or any of the organizations to which the manufacturer belonged directed any misstatements or misrepresentations about the product to the owner, nor did the owner contend that it relied in any alleged misrepresentation in purchasing the building. 29 F.3d at 1286-87. Instead, the owner asserted a "fraud on the market" theory. *Id.* at 1287. The court held that the owner lacked standing because it could not show detrimental reliance on the alleged fraudulent acts. *Id.* at 1826-87. The court below relied on *Appletree* in its analysis of detrimental reliance generally and in its analysis of Petitioners' fraud on the market theory. App. 7a, 11a.

Petitioners cite two other Eighth Circuit decisions that they allege are "more representative" of Eighth Circuit jurisprudence. *Appletree* is dismissed as an "anomaly." Petition, at 10. Yet the Eighth Circuit has never perceived a conflict between *Appletree* and its other decisions, nor has the Circuit seen any need to distinguish *Appletree* in these decisions.

In *United HealthCare Corp. v. American Trade Ins. Co.*, 88 F.3d 563 (8th Cir. 1996), the plaintiff showed that it paid premiums for insurance coverage that were diverted by the defendant into accounts that he controlled, while he caused certificates purportedly evidencing non-existent insurance coverage to be issued to the plaintiff. *Id.* at 567-68, 573. The discussion cited by Petitioners, Petition at 22 n.16, 88 F.3d at 571 n.5, related only to proof of the predicate offenses of mail fraud and wire fraud, which do not themselves require reliance. *Id.*

In contrast, *Bieter Co. v. Blomquist*, 987 F.2d 1319 (8th Cir. 1993), was a bribery case. *Id.* at 1324. The court addressed RICO's application to the bribery context at some length. *Id.* at 1325-30. The court's conclusion does not articulate a conflicting rule with that of the court below in a misrepresentation case.

Atlas Pile Driving Co. v. Di Con Fin. Co., 886 F.2d 986 (8th Cir. 1989), predates *Holmes*, and holds only that a showing of mail fraud is not dependent on a showing of common law fraud. *Id.* at 980, 993.

E. Petitioners' Argument That There is a Conflict with the Eleventh Circuit Depends on a Vacated Opinion.

In asserting a conflict with Eleventh Circuit authority, Petitioners concede that the court below properly relied on *Pelletier v. Zweifel*, 921 F.2d 1465, 1499 (11th Cir.), *cert. denied*, 502 U.S. 855 (1991), cited with approval in *Holmes*. Yet Petitioners assert that their conflicting rule was adopted in *Taffet v. Southern Co.*, 930 F.2d 847 (11th Cir. 1991), *vacated*, 958 F.2d 1514 (11th Cir.), *aff'd on rehearing*, 967 F.2d 1483 (11th Cir. 1992). Apart from the fact that the opinion that Petitioners contend adopted their

rule was vacated, the court held on rehearing that the plaintiff had not suffered a predicate injury and thus failed to the threshold requirements of RICO. *Taffet*, 967 F.2d at 1494. If the plaintiff sustained no cognizable injury, there could be no holding on proximate causation.

Of the other Eleventh Circuit cases cited by Petitioners, *Cox v. Administrator, United States Steel & Carnegie Pension Fund*, 17 F.3d 1386, *as modified*, 30 F.3d 1347 (11th Cir. 1994), *cert. denied*, 513 U.S. 1110 (1995), was another bribery case. *All Care Nursing Service, Inc. v. High Tech Staffing Servs.*, 135 F.3d 740, 745 (11th Cir. 1998), *cert. denied sub nom. Prof'l Nursing, Inc. v. Bethesda Mem'l Hosp., Inc.* 526 U.S. 1016 (1999), was a case in which the court held that there was no colorable challenge to the plaintiff's RICO injury. Once again, analysis of the cases shows that there is no conflict within the circuit or with the decision below.

F. Petitioners' District of Columbia Authority Does Not Negate the Reliance Requirement.

Petitioners cite *BCCI Holdings (Luxembourg), S.A. v. Khalil*, 214 F.3d 168 (D.C. Cir.), *cert. denied*, -- U.S. --, 148 L. Ed. 2d 295 (2000), as rejecting the *Summit* requirement for reliance. But in *BCCI*, the facts were essentially uncontested. 214 F.3d at 170. The defendant was alleged to have acted as a nominee shareholder to conceal weakness in the bank's financial condition and other illegal activity and to have used his position to loot the bank's assets. *Id.* The court rejected the defendant's argument that the plaintiff must prove that it was the "intended target" of the RICO scheme and that the alleged injury was the preconceived purpose of the RICO activity. *Id.* at 173. There was no factual dispute concerning reliance on the alleged concealment. *See id.* at 170. The plaintiffs clearly alleged

that the defendant's concealment proximately caused their harm.

III. There is No Requirement for Uniformity Between Civil and Criminal Enforcement.

Petitioners also argue that there must be uniformity between the criminal and civil RICO enforcement schemes. Petition, at 7. Petitioners assert that the lack of uniformity will undermine RICO's dual enforcement scheme. Yet the courts have always recognized that the criminal aspects of RICO enforcement have substantial differences from its civil aspects. In *Sedima*, 473 U.S. at 493, this Court held that there is no requirement for criminal conviction to proceed with civil RICO claim for same activity. This obviates any concept of a necessary uniformity in enforcement.

IV. Petitioners' Attempted Federalization of Products Liability Claims Faces an Even Greater Body of Adverse Authority.

Holmes calls for an analysis of whether the alleged RICO injury is "direct" in the proximate cause sense. 503 U.S. at 272 n. 20. As a part of this inquiry courts consider whether there are more direct plaintiffs. But there is no implication that there is necessarily any plaintiff who can maintain a RICO claim. As the Court has observed, a defendant is not liable in RICO to those he has not injured, *Sedima*, 473 at 496, nor is he liable under RICO to those that he might have injured by other conduct. *Id.* Civil RICO was not intended, as the court below correctly held, as a general federal tort law.

There is now also a substantial and recent body of precedent that petitioners are unable to deal with rejecting federalization of products liability claims through RICO. Pension funds and health insurers filed many cases against

tobacco manufacturers alleging RICO claims. These have been uniformly rejected on the grounds that the alleged injury is too remote to satisfy RICO's proximate cause requirement. *See, e.g., Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229 (2d Cir. 1999), *cert. denied*, -- U.S. – 120 S. Ct. 799 (2000); *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912 (3d Cir. 1999), *cert. denied*, 528 U.S. 1105 (2000); *Texas Carpenters Health Benefit Fund v. Philip Morris, Inc.*, 199 F.3d 788 (5th Cir. 2000); (*International Brotherhood of Teamsters, Local 734 Health & Welfare Fund v. Philip Morris, Inc.*, 196 F.3d 818 (7th Cir. 1999); *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.*, 185 F.3d 957 (9th Cir. 1999), *cert. denied*, -- U.S. --, 120 S. Ct. 789 (2000).

CONCLUSION

Petitioners have postulated a conflict between the circuits in order to obtain review of the Court of Appeals' routine application of §1964(c) and this Court's ruling in *Holmes*. Review of the case law demonstrates that the alleged conflict is contrived. The court below followed a substantial body of precedent in rebuffing Petitioners' attempt to federalize the law of products liability. The petition for writ of certiorari should be denied.

Respectfully Submitted,

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